TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]33

J. W. HURLEY, APPELLANT,

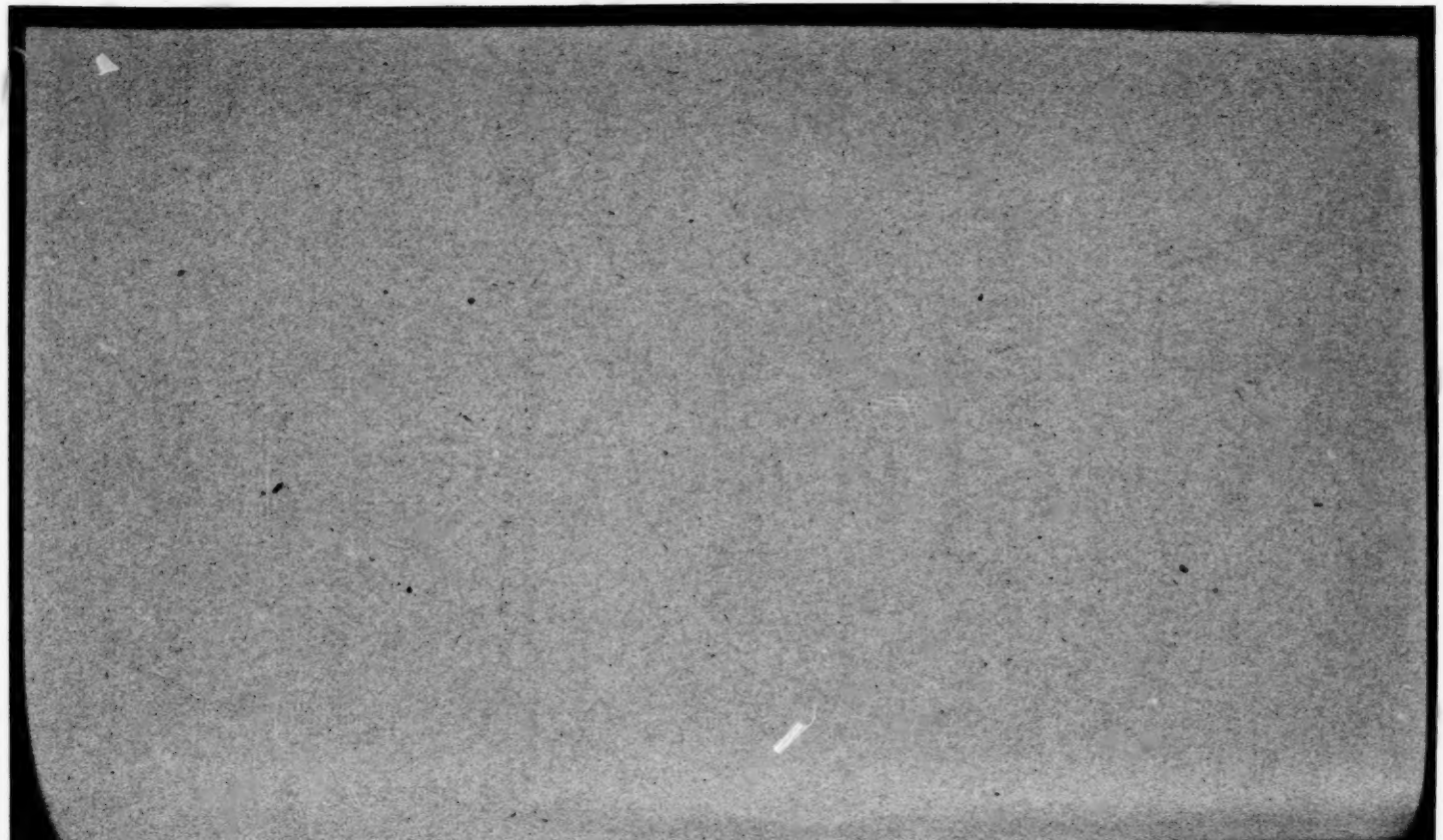
vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED APRIL 10, 1920.

(27,614)



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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stand, Members of Commission of Fisheries, J. Tyler Crittenden, Inspector, F. K. Sprinkle, Inspector, and Fred E. Rudeger, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 6th April next, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein J. W. Hurley is complainant, and you are defendants to show cause, if any there be, why the decree rendered against the said J. W. Hurley in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the United States District Court for the Eastern District of Virginia, this 8th day of March, in the year of our Lord one thousand nine hundred and twenty.

EDMUND WADDILL, JR.,
United States District Judge.

b I hereby accept legal service of the within Citation this 11th day of March, 1920.

RO. W. SHULTICE,
Counsel for Defendants.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, Begun and Held at the Court Room Thereof in the Post Office Building, in the City of Richmond, Virginia, on the first Monday in the month of October, being the sixth day of the same month, in the year one thousand nine hundred and nineteen.

Present: The Honorables J. C. Pritchard and Charles A. Woods, Circuit Judges for the Fourth Judicial Circuit, and Honorable Edmund Waddill, Jr., United States District Judge for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In Equity. No. 45.

J. W. HURLEY, Complainant,

versus

THE COMMISSION OF FISHERIES OF VIRGINIA, F. NASH BILISOLY, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, Members of Commission of Fisheries; J. Tyler Crittenden, Inspector; F. K. Sprinkle, Inspector, and Fred E. Rudeger, Defendants.

Bill of Complaint.

Filed February 27th, 1919.

To the Honorable the Judges of the District Court of the United States in and for the Eastern District of Virginia:

J. W. Hurley, a citizen and resident of Middlesex County, State of Virginia, brings this, his bill of complaint, against Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Donald T. Stant, members of Commission of Fisheries, J. Tyler Crittenden, Inspector, of
2 Middlesex County, Virginia, F. K. Sprinkle, Inspector, of Middlesex County, Virginia, and Fred E. Rudeger, and states that the office and place of holding its meetings or sessions for transaction of business of said Commission of Fisheries is at Norfolk, Virginia, in the eastern district of Virginia; that the said members of said Commission of Fisheries are citizens and residents of the State of Virginia and the following members of said Commission of Fisheries are residents in the eastern district of Virginia, F. Nash Bilisoly and Thomas Henry Nottingham; that the said J. Tyler Crittenden and F. K. Sprinkle are residents of Middlesex County in the eastern district of Virginia; and thereupon your orator complains and says:

1. That your orator is a citizen of Middlesex County, State of Virginia; is an oyster planter upon the oyster grounds of the Rappahannock River within the boundaries of said County, and has been so engaged in said oyster business for a period of twenty years prior to the institution of this suit; that he has likewise been engaged as tonger, packer and shipper of oysters and that he is at present and has been for a number of years last passed as lessee from the State of Virginia, the occupant of certain oyster planting ground lying in the Rappahannock River and within the jurisdiction of this Court; That as such lessee he is the occupant of two certain lots or parcels of planting ground located as follows: One lot or parcel said to contain twenty-five and one-half (25½) acres, and which is located between Robinson's Creek and Urbanna Creek, as is shown by

a certified copy of a plat of the said oyster planting ground,
3 which is now recorded in the Clerk's Office of the Circuit Court of Middlesex County, Virginia, which said plat was made from a survey of the same by R. L. Blake, County surveyor of Middlesex County, which said plat was recorded in the Clerk's Office of said County on November 28, 1898, all of which will more fully appear from an inspection of said certified copy, which is herewith filed marked Exhibit "A" and prayed to be read as a part of this bill.

2. That he is also the occupant as aforesaid of another lot or parcel of oyster planting ground said to contain twenty-one and ninety-eight one hundredths (21.98) acres, and which is located in the Rappahannock River to the east of Urbanna Creek and is part of Rose Gill Farm.

3. As to the lot or parcel of oyster planting ground hereinbefore referred to, lying between Robinson Creek and Urbanna Creek, and said to contain twenty-five and one-half (25½) acres, your complainant begs leave to represent that he acquired the same from a number of small renters who had acquired the same, as is provided by statute;

Your complainant purchased from said lessees of the State any and all rights that they had to said oyster grounds, and
4 thereby became a sub-renter and assignee of all the rights and privileges of the original renters;

That all of the original renters held but small areas, some of them only small fractions of an acre; and that after your complainant acquired their rights to the said ground, as aforesaid, he had the said R. L. Blake, County surveyor of Middlesex aforesaid, make a survey and plat of said ground, which said plat is Exhibit "A" with this bill;

That ever since your complainant acquired the aforesaid ground, he has continuously and exclusively occupied the same as oyster planting ground; that he has regularly annually paid to the oyster inspector for that District the rental for said land since he has held same, up to and including the rent due and payable the first day of September, 1918;

4. That as to the lot or parcel of oyster planting ground said to contain 21.98 acres and which is located in the Rappanhannock River east of Urbanna Creek and in front of Rose Gill Farm, your complainant begs leave to represent that said oyster planting ground was originally regularly assigned to George V. Wagnen and R. W. Franklin;

That on the 17th day of August, 1909, your complainant acquired as sub-renter and lessee eight (8) acres of the said oyster planting ground, four acres each from the said Wagnen and Franklin, which said transaction is evidenced by a certified copy of the transfer of the said oyster planting ground, and which was legally affirmed by A. E. Segar, then oyster inspector for the district in which said ground is located.

A certified copy of said transfer is herewith filed, marked Exhibit "B" and prayed to be read as a part of this bill;

That previous to that time, to wit: On the — day of — 19—, the said George V. Wagnen had transferred all of his right as renter and lessee from the State in three parcels of oyster planting ground, lying adjoining the oyster shore last above referred to, which
5 said parcels of oyster ground contained, respectively, four (4) and four (4) and five (5) acres, to the Urbanna Fish & Oyster Co., Inc., and which said transfer was regularly affirmed and which your complainant assumed had been done as directed, until recently he has ascertained from an inspection of the records of Middlesex County, Virginia, that such transfer was not of record in the Clerk's Office of the said County of Middlesex;

Your complainant begs leave to represent that he has regularly, annually, paid to the oyster inspector for the District in which said oyster bottom lies, the rental due the State for the whole of the twenty-one and ninety-eight one hundredths (21.98) acres, as embraced in the transfers from the said George V. Wagenen, R. W. Franklin and the said Urbanna Fish & Oyster Company, up to and including the taxes due and payable on September 1, 1918.

That since so acquiring the oyster bottom last referred to, your complainant has had continuous and exclusive occupancy of same;

That the aforesaid oyster planting grounds transferred as aforesaid to the Urbanna Fish & Oyster Co., Inc., and duly recorded in the Clerk's Office of the Circuit Court of Middlesex County on April 3, 1903, was by said Urbanna Fish & Oyster Co., Inc., transferred to your orator and as he supposed, the said last named transfer had been duly recorded as provided by law;

That Walter H. Ryland was a stockholder in and one of the officers of the said Urbanna Fish & Oyster Co., Inc., and was the regularly retained counsel for your orator and was instructed to have said last named oyster shore so acquired, regularly and legally transferred, but that the same was not recorded as now appears from an examination of the records in said Clerk's Office.

Your orator, however, states the fact to be that he has had continuous and exclusive occupancy of the said last named oyster bottom as a renter from the State of Virginia; that he has regu-
6 larly paid the rent for the same to the inspector of said district in which the same is situated; that your orator owns all stock in Urbanna Fish & Oyster Co., Inc., & is therefore entitled to hold their profits.

That the title as a renter from the State of Virginia of all of the said oyster grounds occupied as aforesaid by your orator, has never been questioned since his occupancy as aforesaid, until within the last four months, the rent having been regularly paid and he having used the same for the planting and propagating of oysters, and that he has now large quantities of oysters, planted on said ground by him in the course of his said business, to wit: certainly as many, if not more, than fifteen thousand (15,000) bushels of oysters, over and above all that he had taken from said bottom;

Your complainant begs to state that he has continuously kept the

oyster shore, hereinbefore referred to, staked up and marked as is required by law; and that said stakes and marks are now in the same location and position as they were, when the aforesaid oyster ground was acquired by your complainant;

That at the time the said oyster planting grounds were acquired by your complainant; the same were absolutely worthless as natural rocks; that there were no oysters on same or virtually none; that the oyster men working in that vicinity ignored it as an oystering ground, and that it was only at rare intervals that someone would go on same to "nipper" or catch single oysters that they could see with the naked eye; that complainant has by great energy, hard work and the expenditure of large sums of money in planting oysters and oyster shells on the said bottom, made the same profitable;

Complainant begs to represent unto the court that he acquired the aforesaid oyster planting ground, as he has above set forth, in good faith and for valuable consideration, from persons and a corporation,
who he avers had come into possession of same in a lawful
7 and bona fide manner, and who had the right to dispose of same, or their rights in same, to complainant;

That the oyster bottom now occupied by complainant is the identical bottom that he so acquired, and that he has always maintained and kept up the stakes, marking the metes and boundaries of said oyster planting ground as they were when he acquired the same;

That the said oyster planting ground was regularly and lawfully assigned to the assignors of complainant by the regularly constituted officers of the State of Virginia and the County of Middlesex for the purpose of planting and propagating oysters on same;

That complainant did not believe, at the time that he acquired the said planting ground, that same was a natural oyster rock, either in fact, or as designated by the statute as to same; in other words, that he did not then, nor does he now, believe that the said oyster bottom or any part of same, is within the limits of the Baylor Survey;

That he has held same for all of these years, unmolested and undisturbed by anyone; that the regularly constituted officers, viz: the various oyster inspectors for that district, have regularly, each year, collected from complainant the rental due the State from same; and that complainant never heard that his right to hold said oyster planting ground was questioned, until some time in the year 1917, he was informed that an application was being, or had been, circulated for signatures, praying that the Commission of Fisheries would have re-established the lines of the Baylor Survey, in that part of the Rappahannock River adjacent to your complainant's oyster planting ground aforesaid, but complainant, feeling secure in his rights to the said oyster planting ground, paid no attention to this matter and continued to use said oyster bottom as he had done heretofore, even planting large quantities of oysters on said oyster
8 bottom for future use, as late as the fall of 1918;

That these oysters, along with large quantities of other oysters, and oyster shells heretofore planted on said ground by com-

plainant, are still on said ground, many of same not being merchantable at this time and will not be for some time to come, as complainant had placed said oysters and shells on said oyster bottom for the purpose of propagating oysters, and that the smaller oysters might mature and become fit for use;

Complainant begs to show unto the Court that while the said application for a re-survey of the "Baylor Line" in this locality, was circulated for signatures in the year 1917, that the bond required by the statute governing this matter, was not given until sometime in the summer or fall of 1918;

That complainant had no notice that said bond had been executed, or that such survey was going to be made, as is required by the statute in such case made and provided, and knew nothing of same until the surveyor came into the neighborhood and began to re-establish the said line. After the said "Baylor Line" was re-run by the said surveyor, complainant heard, indirectly, that the said line, as so re-run, would place the oyster planting ground of complainant within the Bayler Survey, and if so, same would under the law, be a natural oyster rock. Having been informed of this and that the said Commission had adopted the report of the said surveyor, which would by operation of law constitute complainant's oyster planting ground, natural oyster rock, complainant applied to the said Commission of Fisheries for time in which to remove the oysters and shells actually planted by him on the said oyster planting ground. This application was made to the said Commission of Fisheries on the 16th day of December, 1918. The said Commission of Fisheries did not pass upon the application of complainant on the day same was made, but the Commissioner of Fisheries, afterwards, to wit; on the 20th day of December, 1918, communicated with counsel for complain-
9 ant, informing him that the said Commission of Fisheries refused to grant the said application of complainant. The letter of said Commissioner of Fisheries, addressed to T. J. Downing, counsel for complainant, is in the following words:

Commission of Fisheries of Virginia,

Norfolk, Va., Dec. 20, 1918.

Col. T. J. Downing,
Lancaster C. H., Va.

MY DEAR COLONEL:

With reference to the application of your client, Mr. Hurley, for time to remove his oysters from the public rock, I beg to advise that the Commission decided they had no authority under the law to give Mr. Hurley time in this case, since the testimony of the engineer precluded in the minds of the Commission the reconciling of the plats recorded in the Clerk's Office of Middlesex, showing the original assignments, with the ground now held by Mr. Hurley.

I am notifying you before opening the ground to the public that

you may have the opportunity of protecting said oysters by injunction if you wish to carry the case to Court.

With kindest personal regards, I am

Yours very truly,

(Signed) F. NASH BILISOLY,

Commissioner of Fisheries of Virginia.

Give open ground January 2nd, if nothing further is done.

F. N. B.

That subsequent to the action of the said Commissioner of Fisheries of Virginia aforesaid, the said Board held a further meeting at Urbanna, Virginia, for the purpose of further considering the application of Your Orator for the privilege of removing his oysters and shells planted by him on certain grounds in the Rappahannock River, which said last meeting and said last application was at the instance of the said Board.

10 In a communication from F. Nash Bilisoly, Commissioner of Fisheries of Virginia, dated February 18, 1919, directed to Your Orator, which said communication enclosed the decision of the Commissioner of Fisheries, which said letter and which said decision is filed herewith as Exhibit JWH No. *d*, is in the following words and figures, to-wit:

"Commission of Fisheries

of

Virginia.

Norfolk, Va., February 18, 1919.

"Mr. J. W. Hurley,
Urbanna, Virginia.

DEAR SIR:

I enclose herewith decision of the Commission of Fisheries in your case, together with a copy of a letter written this day to your attorney, Col. Downing. While the Commission regrets the loss to you in this matter, it feels that it was the only decision it could render in conformity with the law.

With kindest regards, I am

Yours very truly,

(Signed) F. NASH BILISOLY,

Commissioner of Fisheries of Virginia."

"In the matter of an application made by J. W. Hurley to remove oysters and shells planted by him on certain ground in the Rappahannock River, which has been found by a survey made to reestablish the lines, to lie within what is known as the Baylor Survey, and to be a natural oyster bed, rock or shoal.

This application was made under Section 15 of an Act approved

March 17, 1910, entitled "An Act to revise, arrange, amend and consolidate into one act certain laws relating to oysters, fish, clams, crabs, and other shell fish, and to repeal all acts or parts of acts of the General Assembly, and any section or sections of the Code of Virginia in conflict with the provisions of this Act.

The Commission of Fisheries of Virginia heard this application first, at Norfolk, and afterwards at Urbanna, at both of which places witnesses were examined, and the motion was argued by counsel for the petitioner and for certain citizens of this State who appeared in opposition to the prayer of the petition.

The Commission of Fisheries is of the opinion that before a petition of this kind can be granted, the petitioner must show, first, that he is in possession of a natural oyster bed, rock or
11 shoal without his own default, and secondly, that he must have been placed in possession of the same by mistake of some officer of the State whose duty it was to assign planting grounds to him, properly applied for. This officer may be either the Oyster Inspector or the County Surveyor who surveyed the ground. Both of these matters must be shown by the applicant.

This Commission is also of opinion the statute does not mean that one is not in default who has taken possession of oyster rock without positive knowledge that it was natural rock, provided he had the means of knowing the character of the ground by making such an investigation or pursuing such inquiries as a man would ordinarily pursue in acquiring the title to property. It is not sufficient for him to show that someone had occupied the ground before he acquired it, if, by exercising proper care, he could have ascertained the ground to be a part of the public bottom set apart by law for the use of the citizens of the State.

In addition to this burden, the applicant must also show that the mistake was made at the time of the assignment, either by the Oyster Inspector or the Surveyor. This statute was enacted to give relief to those people who, through mistake of an officer of the State, and without default upon their part, have been erroneously located upon a part of the public bottom not assignable for oyster planting, but expressly reserved for the benefit of all citizens of the Commonwealth.

From the evidence introduced in this case, this Commission is of opinion that the applicant did not show such a case as to entitle him to the relief asked for in his petition. It is admitted that the applicant is on a very considerable portion of the natural rock. It appears that the right to use this ground was purchased by Mr. Hurley from a Company that had purchased this right from the original assignees, and that the stakes at the time Mr. Hurley purchased, were in substantially the same position they now occupy, but it does not appear that the stakes were placed in that position either by Mr. Hart, the former Inspector, or by the County Surveyor, who made the surveys of the various small tracts which now united in one holder, form the subject of this petition. Just how the stakes were moved out upon the public rock, does not appear. The best evidence introduced on this subject, indicates that a former owner moved these stakes out about twenty years ago, and that he not only moved them out, but

extended them a long distance to the eastward into a place where they are almost surrounded by the natural rock, the public ground being on the two longest sides, and one of the short sides of this extension. This ground appears to have been taken in this way about five years before Mr. Hurley purchased the rights of the persons or of the corporation occupying the ground. It has never been reassigned, and is still held by Mr. Hurley under the original assignments.

We think from the evidence in the case, that neither the former Inspector nor the former County Surveyor are in any way responsible for the stakes being out too far, and that the present holder of the ground cannot claim any benefit from what was done by one under whom he claims, although he was ignorant of the fact that a portion of the public ground had been taken in and was being turned over to him.

It has been further shown in evidence by witnesses introduced by the petitioner, that there has been a great deal of complaint throughout the section of country in which this ground lies, as to encroachments upon the public ground. This may not have been sufficient in itself to cause Mr. Hurley to make inquiry as to the proper
12 location of this ground, but the fact that a very considerable portion of it lies, as has been above stated, in a position where it is almost entirely surrounded by the natural rock, was certainly a circumstance which should have put the purchaser upon notice. The plats of the original surveys were recorded in the Clerk's Office in Middlesex County, and were constructive notice to anyone desiring to acquire those holdings, and a prudent man should certainly have examined these plats and have ascertained the true location of the ground which had been assigned by Mr. Hart, then the Oyster Inspector, especially in consideration of the fact above stated, that much of this ground extends in a long strip between almost parallel lines for a considerable distance into a well known parcel of public oyster ground.

For these reasons, we refuse to grant the prayer of the petition."

Your Orator furthermore has received notice from the Commission of Fisheries that on the 1st day of March, 1919, the stakes bounding his oyster grounds will be removed by order of said Board and the oysters of Your Orator owned and planted as aforesaid, turned out to the public to be removed from said oyster grounds by any person so desiring.

Such action of the said Board thus depriving Your Orator of his property is contrary to the Constitution of the United States and is the taking of property without due process of law.

That without any notice, Mr. Fred E. Rudeger, the surveyor appointed as aforesaid during year 1918, did go upon the said oyster planting ground of this complainant and did reestablish a line claimed by him to be the Baylor Line and did thereby include within said Baylor Line so established by him, practically all of the aforesaid planting ground claimed by your complainant, as aforesaid,

and upon which he had oysters and oyster shells actually planted thereon;

That subsequent thereto, the said surveyor, on the — day of December, 1918, came to Middlesex County and stated that he had been directed by the Commission of Fisheries to turn out to the public the planting grounds of your complainant and to remove the stakes designating the same therefrom. This was the first notice received by your complainant that any action had been taken
13 by the said Commission of Fisheries upon the report of said surveyor;

That your complainant at once telegraphed to T. J. Downing, stating the conditions then existing and said attorney went to Norfolk, Virginia, and ascertained that the report of said surveyor was as hereinbefore stated; that application was thereafter made to the said Board for permission to remove the said planted oysters and shells from the said ground;

That the result and effect of the said order of the said Commission of Fisheries, directing the removal of the stakes designating the oyster ground of the complainant, and adjudging the said oyster ground to be within the Baylor Survey and therefore public oyster rock, and the turning over of said oyster ground of the complainant to the public, means the taking from him by the public oyster tongers, without any compensation, property valued at over $8000.00, and such taking would be so accomplished that it would be impossible to protect his rights in the premises and would cause irreparable loss and damage to your complainant, due to the fact that the grounds would be entered upon by a number of oyster tongers, many of whom are insolvent and from whom damages could not be secured, and would necessitate the multiplicity of damage suits, the result of which could not foretold;

That in a short time under such circumstances, all the oysters, the property of your complainant, as aforesaid, would be removed by said tongers from the said planting grounds, said removal being a total loss to your complainant of his said property.

2. The oyster law of the State of Virginia which is applicable in the instant cause is contained in Section 39 and 15 of the Oyster Law and is in the following words:

(15) "When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks and shoals
14 as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commissioner of Fish-

eries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground, and any person other than the said holder, his agents or employees, going upon the said ground and taking oysters or shells therefrom before the expiration of the time allowed said holder, shall be deemed guilty of larceny thereof, and shall be punished as provided by this act for the larceny of oysters."

(39) "The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms as may be agreed upon, any surveyor, or surveyors, to survey, or resurvey, any oyster-planting grounds, either in his own or any other county, and to re-establish and permanently mark any line or lines of the Baylor geodetic survey, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor geodetic survey re-established and permanently marked, provided a bond and security be given to the Commission of Fisheries that the applicants will pay all costs for surveying and marking; and provided further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby; and if it should turn out that it was not necessary, in the opinion of the Commission, to have said line or lines re-established, then all costs of the survey and marking shall be borne by the applicants; but if it shall appear that the Baylor geodetic survey had been encroached upon, then the cost shall be borne by the Commission of Fisheries and the bond given be void."

The Constitution of the United States provides that no person shall be deprived of property without due process of law. The fundamental requisites of due process are, first, adequate notice; second, a hearing; third, the application of equal laws; fourth, jurisdiction. In all cases reasonableness of the notice required under a State statute involves a vital element of due process. Under Section 39 of the Oyster Law above set forth, the Commission of Fisheries is authorized and empowered to select and appoint a surveyor to re-establish and permanently mark any line or lines of the Baylor Survey, but before this is done, ten days' notice of such survey shall be given to all parties "whose legal oyster tenures might be directly affected thereby." This notice was in fact, not given to the complainant, but it would appear that the said Board, without notice or hearing, proceeds to ascertain whose grounds are included in
15 the said legal oyster tenures.

The provisions of the said Oyster Law do not provide for any hearing before the said Board upon the coming in of the report of the surveyor so appointed as aforesaid. No provision for any notice, nor, in fact, for any of the requisites of due process of law. This failure of the statute so to provide for a hearing upon the action of the Commission of Fisheries is a denial of due process of law as provided by the Constitution of the United States and renders the said law unconstitutional and is a taking of private property without such due process.

Without the guaranty of due process, the right of private property cannot be said to exist in the sense in which it is known to our laws, and whatever else may be uncertain about the definition of the term, all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to separate usages and modes of procedure and without notice or an opportunity for a hearing. The facts in the instant case show that, while the complainant, as an oyster planter and a renter from the State of Virginia had innocently and within what he considered his legal rights, planted oysters and oyster shells upon the oyster bottoms of the Rappahannock River, the value of which plants amounted to over $8000.00 at the time that the action was taken by the aforesaid Board, he is about to be deprived of his said property without having been granted a hearing and without any provision in the Oyster Law for any such hearing; and that in fact, the said Commission of Fisheries have under such circumstances and the conditions above set forth, in an arbitrary, oppressive and unjust proceeding, directed that the property of your complainant shall thus be turned over to the public, the stakes designating his ground removed therefrom, and his oysters planted thereon held not to be his and likewise, refuse to grant to him a reasonable time within which to remove the same from said planting grounds.

It is, therefore, respectfully submitted that, since no hear-
16 ing is provided for by the statute and none is contemplated, the same is rendered unconstitutional and that the act of the members of the said Commission of Fisheries is without authority of law and should be restrained from further proceeding in this matter. As a general rule it may be said that notice is sufficient when the person who is to be deprived of his property has, at some stage of the proceeding, been given an opportunity to present objections to the action proposed against him to a court of authority authorized to give effect to such objections, provided it considered them valid; but in the instant case no such provision is made; no such action was taken providing for a hearing, and none was or is contemplated.

The courts have authority to enjoin the officers of the State where they are acting under the color of an unconstitutional statute whereby they commit acts of wrong and injury to the rights and property of a complainant, which rights and property were acquired under contract with the State or otherwise, and these suits may be brought in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury. Suits of this character when brought in United States courts are not within the meaning of the 11th Amendment, an action against the State. It will appear from the letter to T. J. Downing, that your complainant is only allowed until March 1st, 1919, to apply for an injunction, and the order of the Commission of Fisheries, turning out the private grounds of your complainant to the public, is held up until said last named date; that your complainant could not, within said period of time, remove his said oysters from said grounds even though he were allowed so to do by the order of said board. It is submitted that irreparable loss and damage would result to your complainant unless

a temporary restraining order is granted him to prevent the destruction of his property and the taking of same by the public oyster tongers or other persons on and after March 1st, 1919.

17 To the end, therefore, that your orator may obtain complete relief, herein according to the course and practice of this court, sitting as a court of equity, and he has no adequate remedy elsewhere, he prays that there may be granted to him the relief enumerated below and all such other further and general relief as may be just and right and in accordance with equity and good conscience.

(1) That the defendants, The Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, and also J. Tyler Crittenden, Inspector for District No. — in Middlesex County, Va., and F. K. Sprinkle, Inspector for District No. — in Middlesex County, Va., may be made defendants to this bill and be required to answer the same, and every allegation therein contained, as fully as if directly interrogated as to each, but not on oath, an answer under oath being hereby expressly waived.

(2) That for the reasons stated above, as well as any others that may appear to the court, this court may declare the statute under which the said defendants, viz: The Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, and also J. Tyler Crittenden, Inspector for District No. — and F. K. Sprinkle, Inspector for District No. —, both in Middlesex County, Va., assume to act, unconstitutional, void and of no effect; and the action of the said F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, and also J. Tyler Crittenden, F. K. Sprinkle, and Fred E. Rudeger, herein complained of, null and of no effect, because same was had and done without authority of law.

(3) That the defendants, the Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, as well as the said J. Tyler Crittenden, F. K. Sprinkle and Fred E. Rudeger, and each of them, as well as their successors in office and their officers, agents,

18 attorneys, servants and all others may be perpetually enjoined and restrained from removing the stakes and marks designating the oyster planting grounds in the Rappahannock River now in the possession of your orator, as lessee of the State of Virginia, and occupied by him as oyster planting grounds, as aforesaid, and declaring the same to be public oyster rock, until your orator shall have had reasonable time in which to remove his oysters and shells planted by him on the said ground; and that the defendants aforesaid be further enjoined and restrained, as well as their officers, agents, attorneys, servants and all other persons from in any way interfering with your orator or molesting him in his use and occupation of the said oyster planting grounds or in the removal of his

oysters and shells from the said oyster planting grounds aforesaid; and that a temporary restraining order may be issued against the defendants enjoining and restraining them to the same purpose, tenor and effect as herein prayed for in regard to the said perpetual injunction.

(4) And finally, to the end that equity may be done and that the relief herein prayed, and all other reliefs that it may be righteous in the premises to administer, may be awarded to your orator, may please Your Honors, such relief fully to grant and to award against the said defendants, the Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, as well as J. Tyler Crittenden, F. K. Sprinkle and Fred E. Rudeger, a writ of subpœna ad respondum of the United States, issuing out of and under the seal of this Honorable Court, commanding them, and each of them, upon a certain day therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer to all and singular the premises, and to stand to and abide by such further order, direction and decree as may be made against them, and each of them.

And your orator, will as in duty bound, ever pray.

J. W. HURLEY.

19 H. I. LEWIS & DOWNING,
Counsel for Complainant.

VIRGINIA,
County of Middlesex, To wit:

J. W. Hurley, being first duly sworn, deposes and says that he is the complainant in the aforesaid bill of complaint, knows the contents thereof; and that the statements therein contained are true, except as to such matters and things as are therein stated to be set forth upon information and belief, and as to such matters and things, he believes it to be true.

J. W. HURLEY.

Sworn and subscribed to before me this 24th day of February, 1919.

C. W. EASTMAN,
Clerk of Circuit Court, Middlesex County, Virginia.

Exhibits Filed with Bill.

(Three Drawings or Plats.)

NOTE BY CLERK.—The Exhibits filed with the Bill of Complaint, the same being three drawings, or plats, under stipulation of counsel, are certified for inspection as originals, and accompany this transcript of record.

20 *Chancery Subpœna.*

Issued February 27th, 1919.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The President of the United States of America to the Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., and Donald T. Stant, Members of Commission of Fisheries, and J. Tyler Crittenden, Inspector, F. K. Sprinkle, Inspector, and Fred E. Rudeger, Greeting:

We command you, and every one of you, that you appear at the Clerk's Office of our District Court of the United States for the Eastern District of Virginia, in the Post Office Building, in the city of Richmond, in said District, on the 18th day of March, 1919, to answer the Bill of Complaint of J. W. Hurley, this day filed in the Clerk's Office of said Court, in said City of Richmond then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Virginia to execute:

Witness, the Honorable Edmund Waddill, Jr., Judge United States District Court, for the Eastern District of Virginia, at Richmond aforesaid, this 27th day of February, in the year of our Lord one thousand, nine hundred and nineteen, and of our independence the 143rd year.

[Seal of Court.] JOSEPH P. BRADY,
Clerk,
By R. E. POWERS,
Deputy Clerk.

21 Memorandum.—The above-named defendants are notified that unless they file their answer, or other defence in the Clerk's Office of said Court at Richmond aforesaid, on or before the twentieth day after service of the above Writ, excluding the day thereof, the Bill of Complaint will be taken pro confesso, and a decree entered accordingly.

[Seal of Court.] JOSEPH P. BRADY,
Clerk,
By R. E. POWERS,
Deputy Clerk.

Marshal's Return of Service and Acceptances of Service of Subpœna.

Executed this 28th day of February, 1919, by delivering a true copy of this Writ, to F. Nash Bilisoly, in person, in the City of Portsmouth, Virginia, a place within my district.

JOHN G. SAUNDERS,
United States Marshal.
By HENRY V. MYRICK,
Deputy U. S. Marshal.

Marshal's Fees $2.00
" Expenses, $ .10

Total 2.10

I hereby accept legal service of this subpœna.
March 3, 1919.

THOS. H. NOTTINGHAM.

I hereby accept legal service of this subpœna.
March 6th, 1919.

HORACE L. SMITH.

I hereby accept legal service of this subpœna.
March 3, 1919.

J. H. TYLER, JR.

I hereby accept legal service of this subpœna.
March 3, 1919.

DONALD T. STANT.

22 I hereby accept legal service of this subpœna.
March , 1919.

J. TYLER CRITTENDEN.

I hereby accept legal service of this subpœna.
March 8, 1919.

F. K. SPRINKEL.

I hereby accept legal service of this subpœna.
March 3rd, 1919.

FRED E. RUEDIGER.

We acknowledge legal service of the within subpœna.

J. TYLER CRITTENDEN.
F. K. SPRINKEL.

Demurrer of the Commission of Fisheries of Virginia to Bill of Complaint.

Filed October 30th, 1919.

This defendant by protestation not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint contained to be true in such manner and form as the same are set forth and alleged, doth demur to the said Bill, and for cause of demurrer, showeth:

1. That it appears by the plaintiff's own showing in the said Bill that he is not entitled to the relief prayed for against this defendant.

2. That it appears by the said Bill that the plaintiff's suit while in form against this defendant and certain other (individual) defendants, who are officers of the State of Virginia, is in fact a suit against the State of Virginia, and is for the purpose of adjudicating the title to certain natural oyster beds, rocks and shoals, which are admitted by the plaintiff in his said Bill to be the property of the State of Virginia, yet are prayed to be decreed to this plaintiff.

3. The plaintiff's Bill is inconsistent and contradictory, in that it alleges that he is in possession of certain parcels of natural
23 oyster rocks, beds and shoals (which are the property of the State of Virginia, and which by the Constitution of the State of Virginia, are reserved for the common use of all the people of the State of Virginia), and in other portions of his said Bill he alleges that these natural oyster beds, rocks and shoals are "planting grounds"; that these grounds have been duly assigned to him; that he is legally in possession of same, and is now about to be unlawfully ousted from such legal possession. All of which is inconsistent and contradictory, in as much as no natural oyster beds, rocks or shoals in Virginia can be rented to, or legally in the possession of any individual or corporation. They are all the absolute property of the State of Virginia, and are held in trust by the State for the benefit of the people of said State, and their rental is prohibited by the Constitution of the State of Virginia (Section 175), and by Acts of the General Assembly passed in conformity therewith.

4. The plaintiff is estopped from asking for the relief prayed for, as is shown by the Bill itself. It shows that the plaintiff knowing that he had in his possession natural oyster ground, belonging to the State of Virginia, applied to this defendant to be allowed time to remove his oysters and shells therefrom; that he appeared before this defendant in person and by Counsel on two or more occasions in support of such application, and is therefore bound by the action of the Commission of Fisheries of Virginia refusing the prayer of

his petition. He is now asking this Court to review and reverse a decision which he invited this defendant to make.

5. The plaintiff in praying for relief to prevent the doing of something that has in fact already been done, in this—that he prays that this defendant may be enjoined from determining the ground in his Bill mentioned to be a natural oyster bed, rock or shoal, when his said Bill shows on its face that this Commission has already decided that question, and has promulgated its
24 opinion, which is copied at length in plaintiff's Bill.

The ground was also declared to be natural rock, public and not assignable by Act of the General Assembly in 1894, and was set apart and designated as such by the Baylor Survey (1894). The character and right of possession of the said natural oyster rock is not a matter for judicial ascertainment, the only question ever before the Commission of Fisheries was whether the plaintiff, who admitted he was in possession of a portion of the natural oyster rocks, should be allowed a longer time to remain in exclusive possession of same. This was a question addressed to the judicial determination of the Commission of Fisheries, and this defendant having acted in its judicial capacity, its action is not subject to review or reversal by this Honorable Court.

6. Plaintiff's Bill shows further that the plaintiff is at this time guilty of a criminal act, in that it shows that he is in possession of ground lying within the Baylor Survey, and therefore, a natural oyster rock, bed or shoal, to continue to occupy which, the plaintiff is liable to a fine of not less than Fifty Dollars, nor more than One Thousand Dollars for each offence (Section 14), yet he prays that this Court will grant an injunction restraining the officers of the State of Virginia from removing him from said ground, and he has not therefore, come into Court with clean hands.

Wherefore, and for divers other good causes of demurrer appearing on the said Bill, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said Bill and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

COMMISSION OF FISHERIES OF VIRGINIA,

[SEAL.] By F. NASH BILISOLY,
Chairman of Commission of Fisheries of Virginia.

Attest:
THOS. H. NOTTINGHAM,
Secretary.

25 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

R. W. SHULTICE,
Counsel for Commission of Fisheries of Virginia.

April 23rd, 1919.

STATE OF VIRGINIA,
City of Norfolk, Towit:

F. Nash Bilisoly, being duly sworn, deposes and says: I am Chairman of the Commission of Fisheries of Virginia, one of the above named defendants. The foregoing demurrer is not interposed for delay.

F. NASH BILISOLY,
Chairman of the Commission of Fisheries of Virginia.

Sworn to before me this 13" day of May, 1919. My commission expires on May 22nd, 1920.

LILLIE V. KARN,
[SEAL.] *Notary Public.*

Answer of the Commission of Fisheries of Virginia to Bill of Complaint.

Filed October 30th, 1919.

To the Honorable the Judges of the District Court of the United States in and for the Eastern District of Virginia:

In answer to the said Bill, the Commission of Fisheries of Virginia by its duly authorized officers, to-wit, its Chairman and Secretary, say as follows:

1. It is admitted that J. W. Hurley, the plaintiff, is a citizen and resident of Middlesex County, Virginia, and that the said plaintiff at various times in the past purchased the right to rent certain small parcels of oyster planting ground from various citizens
26 of Virginia, and one corporation chartered under the laws of the State of Virginia, to whom these parcels had been assigned by the duly appointed and qualified Inspectors, officers of the State of Virginia, and these parcels constitute the ground lawfully held and occupied at this time by the plaintiff, but it is expressly denied that any ground was so assigned which lies within the limits of what is known as the Baylor Survey.

In the years 1892 and 1894, the General Assembly of Virginia passed certain Acts requiring all of the natural oyster beds, rocks and shoals to be surveyed and platted, and the plats recorded in the various Clerks' Offices of the Counties in Tidewater Virginia, and said Acts further declared all such ground so designated, to be natural oyster rocks, beds or shoals open to the public, under such restrictions as should from time to time be enacted by the General Assembly of Virginia. This was done to carry out the provisions of Section 1338 of the Code of 1887, which had been the law of this Commonwealth long before the compilation of that Code, but questions had often arisen as to what was or was not a natural oyster rock, bed or shoal, and the Baylor Survey was intended to, and did settle and determine finally this question. All ground outside of

the limits of the survey were declared by the General Assembly to be not natural oyster rocks, beds or shoals, and all ground within the limits of said Survey were declared to be natural oyster rocks, beds or shoals, and their rental, use or occupation was forbidden, except by the public in general; that is to say—no particular or individual interest could be acquired in any of said ground, and it was made a criminal offence for any one to occupy any of said natural oyster rocks, beds or shoals; to plant oysters or shells thereon, or to otherwise have them in his possession, and under his control.

2. This defendant admits that the plaintiff has now in *in* his possession one parcel of land under water, containing 25½ acres,
27 which is located between Robinson's Creek and Urbanna Creek, but it denies that the plaintiff has all of said ground properly in his possession. On the contrary, it alleges that the plaintiff, or those from whom he purchased, have, without any legal right whatsoever, moved out their stakes upon the public bottoms within the limits of the Baylor Survey, and are now claiming a parcel of ground partly within and partly without the limits of the Baylor Survey, when in fact the plaintiff has legal title only to ground lying outside of the Baylor Survey, and his assignments only cover the ground which lies outside of the Baylor Survey now in his possession, and another parcel of ground lying between the ground occupied by the plaintiff and the shore on the South side of the Rappahannock River. Some of this ground the plaintiff or his assigns have abandoned, and have moved out further into the river, so that the acreage claimed by the plaintiff is about the same as the acreage to which he is legally entitled, but the parcel of ground which he has taken from the State of Virginia is comparable in acreage with the part that he has abandoned. The part that he has taken unlawfully amounts to five acres, while that which he seems to have abandoned, amounts to about thirteen acres, all of which will appear from the plat herewith filed, marked "Exhibit I" F. E. R.

This defendant denies that the plaintiff ever had any legal title or color of title to the five acres of ground above mentioned, but on the contrary it alleges that the said ground was taken arbitrarily and without warrant of law, and the plaintiff now seeks to hold the same, knowing that it is public ground and not assignable.

3. This defendant admits that the plaintiff is now in possession of about 21.98 acres of ground under the waters of the Rappahannock River, East of Urbanna Creek, and opposite the Rosegill Farm in Middlesex County, Virginia, but it denies that this ground, or any part thereof, is, or ever was a part of said Rosegill Farm. On
28 the contrary all of the land below low water mark in the Tidal waters of Virginia, is the property of the State of Virginia, and is not and never was owned by any private individual or corporation, or as appertaining to or part of any farm, or other high land. It is true that the plaintiff acquired various small tracts of oyster planting ground outside of the Baylor Survey, lying between the Baylor Survey and the low water mark where it washes Rosegill Farm. Just how the plaintiff acquired these various small

tracts, this defendant is not at this time prepared to say, nor is any question raised as to the fact that the plaintiff purchased these tracts from people or corporations to whom they had been assigned by Oyster Inspectors.

This defendant is advised that the plaintiff has not complied with the law in having these parcels properly reassigned to him, but that is a question which was not considered before this defendant when this case was on trial before it, and the matter was treated at that time as if the plaintiff had complied with the statute law of Virginia in having these small parcels properly re-assigned to him. This defendant, however, emphatically denies that the ground now in the possession of the plaintiff is the same ground which was assigned in small parcels to those from whom the plaintiff acquired it. It is informed, believes and charges that the stakes which marked these parcels of ground when they were assigned, have been moved out into the Rappahannock River, either by the plaintiff Hurley, or by the parties from whom he purchased.

In this instance, as in the case above mentioned, the plaintiff has retained in his possession a portion of the ground to which he is legally entitled, but in this instance the amount which he is legally entitled to of the ground now in his possession is negligable in area. He has possessed himself of 26.90 acres of the natural oyster beds, rocks and shoals lying within the limits of the Baylor Survey, all of which will appear from an inspection of the plat hereinabove referred to. In this instance, as in the one formerly dis-
29 cussed, the plaintiff or those under whom he claims, abandoned a portion of the ground legally assigned, and arbitrarily and unlawfully moved out upon the public domain, taking in ground set apart by law for the use of all the citizens of the State of Virginia. In this instance, the parcels of ground abandoned, seem to contain 25.43 acres, while that taken up unlawfully and improperly as aforesaid, contains 26.90 acres.

4. There is recorded in the Clerk's Office of the Circuit Court of Middlesex County, a plat giving the location and area of all the public oyster rocks, beds and shoals within the waters of that county, and showing their courses and distances, with designated marks on the shore fixing their metes and boundaries. A copy of this plat is herewith filed, marked "Exhibit No. 2," C. F. V., and is prayed to be taken and considered as a part of this Answer.

At the time that the plaintiff purchased the various small tracts of land described by him in his Bill, this plat and plats of these small tracts were all recorded in the Clerk's Office aforesaid, and they show that these small tracts lay without the Baylor Survey, and in positions where the ground was properly assignable to citizens of the State of Virginia for the purpose of planting and propagating oysters. It is denies that any part of any such small tracts were platted as lying within the Baylor Survey, and it is further denied that any land within the Baylor Survey was ever assigned either to the Plaintiff or any person or corporation under whom he claims. The plaintiff did not avail himself of the opportunity he had to examine the records which showed the titles he was purchasing, and he stated

before this defendant when his case was on trial before it, that he had never examined or had the records examined in regard to any of these matters, although he testified further that he paid out a very large sum of money, to-wit, Eight Thousand Dollars for the right to rent the said ground.

This defendant denies that the plaintiff or any person or corporation under whom he claims, was put in possession of any
30 part of any oyster rocks, beds or shoals by any officer of this State, either Oyster Inspector, County Surveyor or other person, and calls for strict proof as to the metes and bounds of all the parcels of oyster planting ground claimed by the said plaintiff in the Rappahannock River, East and West of the mouth of Urbanna Creek, those being the parcels of ground mentioned in the plaintiff's Bill.

It is admitted that the plaintiff has paid the annual tax of $1.00 per acre on certain small parcels of ground in the Rappahannock River, originally assigned to various parties, and since re-assigned, some properly and some improperly, to the plaintiff, but it is denied that the State of Virginia in accepting rent on ground properly assigned waived its title to ground reserved by Section 175 of the Constitution of Virginia to all the people of the State to be used by them in common. Said Section (175) provides that "the natural oyster beds, rocks and shoals in the waters of this State shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this State, etc.," and it is denied that by the acceptance of rent for oyster planting ground, that the State could loose its title to, or be in any way prejudiced in re-asserting its title to natural rock, when the same is found to be in the possession of an individual who has himself, or whose predecessors in title, have simply moved out and squatted upon it.

5. It is untrue, as stated in the Bill, that the plaintiff's title to these grounds has never been questioned until recently. It was shown in evidence by one of his own witnesses, Mr. A. G. Seger, that he called attention nearly twenty years ago to the fact that the natural rock was being encroached upon. It was further shown that there had been complaints continuously for many years that this ground and other ground in the Rappahannock River had been unlawfully seized by oyster planters. Indeed so far-reaching was the complaint, and so loud the clamor, that this defendant has
31 seen fit to have extensive surveys made at the expense of the State, to try to correct a wrong that has been growing from year to year in the Rappahannock River section of this State. It was shown at both trials of this case that the complaint in regard to these grounds had been general and continuous both before Mr. Hurley purchased them and afterwards. This defendant is not advised as to what oysters the plaintiff has planted upon these grounds, and calls for strict proof that he has planted any oysters whatsoever upon them.

It further shows unto the Court that throughout the Tidal waters of Virginia there are certain bottoms known as natural oyster rocks, beds and shoals, where oysters grow naturally, and where they re-

seed themselves and re-produce in great quantities from year to year. These natural rocks may be worked down from time to time, but when let alone they will in time become again covered with oysters. Some seasons the "strike" as it is called, is thick, and oysters are plentiful, other years the "strike" is small, or there is no strike at all, but it is a well known fact that these Virginia oyster rocks, beds and shoals have a great value, not only because oysters will grow well when planted thereon, but because they will in a natural way re-stock themselves.

The plaintiff has alleged on the fourth page of his Bill, that when he acquired these grounds, they were absolutely worthless as natural rocks; that there were a few oysters thereon, or none at all, and that oystermen only worked thereon at rare intervals. This is all denied by this defendant, and it is expressly denied that there can be any such thing as a natural rock so worked down or depleted that it is the subject of individual occupation. Its character of natural rock having been determined by the Baylor Survey and by Legislative Enactments, it can never be occupied by an individual, either by rental or otherwise, but its character is fixed and determined.

32 It is further denied by this defendant that the plaintiff came into the possession of any of this natural oyster rock in good faith, or that he acquired same from persons who had come into lawful possession of it in a bona fide manner. It is also denied that these people had a right to dispose of any part thereof to the plaintiff. On the contrary, it is alleged that the plaintiff or those under whom he claims, first acquired portions of ground lawfully; that they then unlawfully abandoned portions of their legal holdings and unlawfully occupied and took possession of an equal or greater area of natural rock, and it is denied that this was done through an innocent mistake, much less under claim or color of right.

6. It was a matter of general knowledge in Middlesex County, in the neighborhood of Urbanna, in the year 1917, and again in the year 1918, that an effort was being made to have these grounds, improperly in possession of the plaintiff, turned out to the public. It is true, as alleged, that a petition signed by ten or more citizens of Middlesex County was presented to this defendant, accompanied by a bond such as is contemplated by law, but it is untrue that the plaintiff had no notice that these grounds would be surveyed to ascertain whether or not he was in possession of a part of the natural oyster beds, rocks or shoals. On the contrary, his notice was so complete that when Mr. Fred E. Ruediger went to Urbanna in October or November, 1918, for the purpose of surveying these grounds, the plaintiff met him, showed him his lines and re-staked the ground held by him, so that Mr. Ruediger, the Engineer, who had been appointed by the Commission of Fisheries of Virginia to make this survey, would know exactly what ground the plaintiff claimed. Mr. Ruediger then made the survey, which took some time; the plaintiff's place of business is at Urbanna, he lives there, and he knew from day to day and from time to time, what the Surveyor was do-

ing. He knew that the ground claimed by him was found to
33 be partly within and partly without the Baylor Survey. He knew his rights and he knew that if his ground lay without the Baylor Survey he could go into the Circuit Court of Middlesex County and protect his interest. He knew that if he was found to be in possession of ground which he had no right in law to hold, that he had no standing in that court, and he therefore, knowing that he was a wrong-doer, made an application to this defendant under Section 15 of the Oyster Law of Virginia, to be allowed time within which to remove his oysters and shells alleged by him to have been planted on such natural oyster rocks. He thereby submitted his case to the determination of this defendant, which is a Commission composed of five members, exercising certain functions of a court. It can compel the attendance of witnesses and the production of papers, and is the body appointed by the laws of the State of Virginia to hear and determine such questions as were submitted to it by the plaintiff when he saw that his unlawful possession of oyster ground owned by the State, had been discovered.

The plaintiff appeared before this defendant in the City of Norfolk, where its regular meetings are held each month, evidence was heard and the case was argued for the petitioner Hurley, by Col. T. J. Downing, and for the State by Mr. Evans, Commonwealth Attorney of Middlesex County. This defendant decided in December that Mr. Hurley was not entitled to any time within which to remove his oysters and shells, if any he had on the ground lying within the Baylor Survey, and so notified the plaintiff, and Col Downing, his attorney.

It is not true, as alleged in the Bill, that this matter was re-opened by this defendant on its own motion, or because it was dissatisfied with its decision. Counsel for Mr. Hurley met the Chairman of the Commission, Col. Smith a member of the Commission, and Mr. Shultice in the City of Richmond, for the purpose of discussing whether this case should be re-opened, and it was then stated that evidence could be introduced showing that a considerable portion of
34 Rosegill Farm had washed away, so that the land designated by the oyster stakes would appear further out in the river than it would have appeared at the time it was rented to the people from whom the plaintiff acquired it. Thereupon, this defendant seeking to do complete justice between the State and the people of the State upon one hand, and the plaintiff upon the other, agreed to re-open the case, and to go to the town of Urbanna so that the witnesses could attend before it with less inconvenience than they could were the hearing had in the City of Norfolk. About the middle of February the Commission of Fisheries went to Urbanna. Witnesses and Counsel were heard. No evidence was introduced to show that Rosegill Farm had in part washed away, and after maturely considering all of the evidence and the argument of Counsel, this defendant rendered the decision which is copied at length in the plaintiff's Bill.

This matter had been pending before the Commission of Fisheries from early in the fall of 1918 until the middle of February, 1919,

during every day of which time the plaintiff knew that the matter was before this Commission and he was actively in touch with everything that was done from the time the Surveyor, Mr. Ruediger, went to Urbanna to begin the survey until the decision of February 18th, 1919, was rendered. During that time he had every opportunity to show any equity, if any he had, that would entitle him to consideration. This defendant will not go further into this case, except to refer to its opinion, made a part of the plaintiff's bill.

It denies, however, that the plaintiff lacked notice or lacked time and opportunity to present his case. On the contrary, he presented his case as fully and as completely as it is believed he could make it. He was ably represented by Counsel, who not only ably, but eloquently, argued his case before the Commission of Fisheries.

7. This defendant alleges that this suit is one in substance against the State of Virginia. The only question before the Commission of Fisheries was whether plaintiff should be allowed further
35 time within which to remove his oysters and shells alleged by him to be planted upon the parcels of ground found by survey to be natural oyster rocks, beds and shoals. There was then no question of the character of the said grounds, nor did the plaintiff as that time assert any title to said ground, nor did he contend that same did not lie within the Baylor Survey. No effort was made to show that the lines as run by Mr. Ruediger did not conform to the Baylor Survey, nor has the plaintiff ever had a survey made or seriously questioned the accuracy of the Ruediger survey.

By making this application, he admitted himself to be in possession of ground to which he had no right. The question of whether he should have the right to remove any oysters or shells from the same, and as incident to such right, to continue for a certain length of time, to be fixed by the Commission, to remain in exclusive possession of said ground, was the only question before this Commission. His application was refused. The Commission was vested with quasi judicial powers, if not with complete judicial powers. It exercised the powers conferred upon it by law in a judicial manner, and passed upon the question brought before it by the plaintiff for determination, and it is alleged that he cannot now in this Honorable Court seek to have the decision of this defendant reviewed and reversed.

It is alleged that in this proceeding, he is going beyond the matters formerly before this Commission for determination, and is seeking to have a decree entered in this cause whereby this Court will divest the State of Virginia of her title to more than thirty acres of natural oyster rocks, beds or shoals in Rappahannock River, Virginia. This suit is, therefore, more particularly a suit against the State of Virginia than against this defendant and the individuals mentioned in the bill.

It is alleged further that the plaintiff is seeking to prevent the doing of something that has already been done, to-wit, the
36 determination of the question submitted to the Commission of Fisheries by him. The question of whether or not cer-

tain oyster ground is or is not a natural oyster rock, is not a matter for judicial determination. That was determined by the General Assembly of Virginia years ago. The plaintiff has been found to be and he has admitted that he is in possession of a part of the public ground. The only relief he could ask for in this case is to allege and show that Mr. Ruediger has improperly surveyed the ground, and there is no such allegation, nor has the plaintiff ever undertaken to show that the Surveyor did not run the lines in accordance with the original Baylor Survey. These lines are well defined by marks on the shore from which they were run.

This defendant submits that for the reasons, and because of the matters and things hereinabove stated, that the injunction awarded against it by this Honorable Court on the 8th day of March, 1919, ought to be dissolved and that the plaintiff's bill ought to be dismissed with costs.

[SEAL.] COMMISSION OF FISHERIES OF VIRGINIA,
By F. NASH BILISOLY,
Its Chairman.

Attest:
THOS. H. NOTTINGHAM,
Secretary.
R. W. SHULTICE,
Solicitor for Commission of Fisheries of Virginia.

VIRGINIA,
City of Norfolk, To wit:

F. Nash Bilisoly, Chairman of the Commission of Fisheries of Virginia, being duly sworn, deposes and says:

I am Chairman of the Commission of Fisheries of Vir-
37 ginia, the above mentioned defendant. So much of the foregoing answer as concerns my own acts and deeds, and so much thereof as concerns the acts and deeds of said Commission of Fisheries, are true to the best of my own knowledge, and so much thereof as concerns the acts and deeds of any other person or persons, I believe to be true.

F. NASH BILISOLY,
Chairman of Commission of Fisheries of Virginia.

Sworn to before me this 13" day of May, 1919.
My commission expires on May 22nd, 1920.
[SEAL.] LILLIE V. KARN,
Notary Public.

Exhibits A, B, and C Filed with Answer of Defendant.

Note by Clerk: The above exhibits being plats by agreement of counsel are not copied in the record, but are to be certified for inspection as originals. The said original exhibits will accompany this transcript under an order of the District Judge.

Affidavit of A. E. Segar in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, J. Wm. Daniel, a notary public in and for the County of Middlesex, in the State of Virginia, in the said county, A. E. Segar and being first duly sworn deposes and says:

First. That he is a resident of the County of Middlesex, Virginia, and is now fifty-two years of age, that he has lived in the said
38 county for the past twenty-five years.

Second. That he was appointed an oyster inspector for District No. 18B, which is now District No. 27, in Middlesex County, Va., in 1898 and continued to hold that office until April, 1918, having been the immediate successor of B. F. Hart, Oyster Inspector.

Third. That B. F. Hart was oyster inspector, for said district, at the time the "Baylor Line" was run, that the affiant knows that B. F. Hart gave close attention to the running of the Baylor Line and for the purpose of thoroughly acquainting himself with the location of the Baylor Line, he accompanied Captain Baylor while the survey was being made of the oyster rocks in his said District, that the affiant knows that B. F. Hart was a very careful and observant man, and was very particular as to all of the duties pertaining to his office; and that he knows that B. F. Hart made several parties move their stakes in when he found they were infringing on the Natural Oyster Rock.

Fourth. That when the affiant succeeded B. F. Hart as Inspector for the said district, the affiant went over the oyster shore in said district to acquaint himself with the boundaries of oyster shore in said district with which he was not already familiar; that he has known the oyster shore now held by the complainant, J. W. Hurley, since 1898 when he became oyster inspector for said district, and that he believes the stakes now marking its outer boundary are just where they were when he first noticed them and that he does not believe that they have been moved out since Mr. J. W. Hurley has held it.

Fifth. That he is satisfied that the stakes now marking the outer line of J. W. Hurley's oyster shore are not further out than they were at the time he became inspector; except a piece of shore on the extreme eastern end of the shore lying down the river from the mouth of Urbanna Creek, which piece of shore was in the possession of the Urbanna Fish and Oyster Company at the time it was
39 sold to J. W. Hurley and was transferred to him along with the other holdings of the Urbanna Fish and Oyster Company and that the line as at present staked up is the same that was maintained by the Urbanna Fish & Oyster Company, Wagner and Franklin, and that the stakes marking the line around said oyster planting

ground have not been changed since Mr. Hurley came into possession of it.

Sixth. That the affiant does not state positively that the stakes marking the outer line of J. W. Hurley's oyster shore are where they were when it was originally assigned, but he believes that his predecessor in office, B. F. Hart, knew as much about where the Baylor Line, in that part of the river as any man in the county, for he heard him say that he took notes at the time of the survey so that he would know where the line ran, and so that in making assignments of oyster planting ground he would know how to locate same, and knowing the line as well as he did he knows that he would not have permitted these stakes to have remained out further than he had located them, and that he would not have collected shore rent on oyster planting ground that he was not satisfied was properly located and that when the affiant succeeded B. F. Hart the stakes marking this shore were where they are now as far as he can tell and that he would not have permitted them to embrace natural oyster rock if he had known it, nor would he have collected rental for oyster planting ground within the "Baylor Survey;" that he knows from the records that came to him from Mr. Hart that he collected the annual rental from the holders of this shore, and that all during the affiant's incumbency of office he collected the annual rental for said oyster planting ground from Wagenen and Franklin, and from the Urbanna Fish and Oyster Company and last from J. W. Hurley.

A. E. SEGAR,
Affiant.

40 Subscribed and sworn to before me, a notary public, for the county aforesaid in the State of Virginia, this 28th day of October, 1919.

[SEAL.] J. WM. DANIEL,
Notary Public.

My commission will expire February 12, 1920.

Affidavit of James S. Chandler in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a notary public in and for the county of Middlesex, in the state of Virginia, in the said county, James S. Chandler, and being first duly sworn deposes and says:

First. That he is a resident of the town of Urbanna, Middlesex County, Virginia, having lived and resided in said town, county and state all of his life. That he is fifty years of age, and is well acquainted with the complainant, J. W. Hurley, and with the oyster business in the Rappahannock River having been engaged in said oyster business for more than twenty years and is now engaged in said business.

Second. That J. W. Hurley is a resident of the said town and county, and has been an oyster planter and dealer in oysters on said Rappahannock River for more than twenty years. That J. W. Hurley is a renter from the State of Virginia of a large amount of oyster planting ground in said river, and has large quantities of oysters and shells planted thereon.

Third. That he is well acquainted with that part of J. W. Hurley's oyster planting ground which lies between Remlik Wharf and Urbanna Creek having been an oyster inspector for six years of Oyster District No. 28c which comprised the territory between Urbanna Creek and the Essex County Line on the Rappahannock
41 River in which district this part of J. W. Hurley's oyster shore is located.

Third. That he was present when this shore was originally assigned, was present on several occasions when the line was rerun, has been passing back and forth along the stakes marking its outer line, and states positively that the stakes now marking the outer line of this shore have not been moved out but are where they were when the shore was originally assigned.

Fourth. That he positively states J. W. Hurley made application for a piece of oyster planting ground which lies outside the outer line of this shore, and that he informed J. W. Hurley that the ground he was applying for was inside the Baylor Survey, and that J. W. Hurley withdrew his application.

Fifth. That he knows of his own personal knowledge that J. W. Hurley has planted, within the past two years on both his pieces of oyster planting ground, a large quantity of oysters and shells, that a large part of these oysters and shells were planted on the outer part of his shore which the Commission of Fisheries contend is natural oyster rock and inside the Baylor Survey, that these oysters and shells have not been taken up, and that J. W. Hurley will lose a large sum of money if he is not permitted to remove his oysters and shells, from that part of his oyster shore which the Commission of Fisheries of Va. contend is inside the Baylor Survey, before it is turned out to the public.

JAMES S. CHANDLER,
Affiant.

Subscribed and sworn to before me this 24th day of October, 1919.
[SEAL.] L. N. WEAVER,
Notary Public.

My Com. Exp. 8/23/1922.

42 *Affidavit of V. L. Thornton in Behalf of Complainant.*

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a Notary Public, of and for the county of Middlesex, in the State of Virginia, V. L. Thornton, who being first duly sworn deposes and says:

First. That he is a resident of the County of Middlesex, Va., having been born in said county and resided in same all of his life, that he is fifty-four years of age, and that he is acquainted with the oyster business in the Rappanhannock River having been engaged in said business for the past thirty years, that he is well acquainted with the complainant, J. W. Hurley.

Second. That the complainant, J. W. Hurley, is a resident of the town of Urbanna, Middlesex County, Va., and is engaged in the oyster business as a planter and dealer in oysters, and has been engaged in said business on the Rappahannock River for twenty years or longer, that he is a renter from the State of Virginia of a large amount of oyster planting ground in said River on which he has large quantities of oysters and shells planted.

Third. That he was present when the oyster planting ground which J. W. Hurley now holds was originally assigned, and that a piece of shore which adjoins the shore now held by J. W. Hurley was assigned to the affiant which he still holds, that the stakes marking the outer line of J. W. Hurley's oyster shore have not been moved out since the shore was originally assigned, and are just where they were when the shore was assigned by B. F. Hart, oyster inspector, that he can tell this by the land marks.

Fourth. That he knows that J. W. Hurley has planted a large quantity of oysters and shells on that part of his oyster planting ground which the Commission of Fisheries contends is natural rock, and that he will lose a large amount of money if he is not permitted to remove these oysters before the shore is turned out to the
43 public.

Fifth. That he knows that part of the shore which J. W. Hurley purchased from the Urbanna Fish & Oyster Company was bare of oysters and shells at the time he purchased it, as it was dredged by G. V. Wagnen prior to the time J. W. Hurley purchased it, and that the oysters and shells now on the shore were planted there by J. W. Hurley.

Sixth. That when the shore which the affiant holds and also the shore which J. W. Hurley holds was first assigned, all outer corners were marked by piles of shells, and in this way the affiant can tell that the stakes marking the outer lines have not been moved as the

stakes marking the outer lines are in line with the piles of shells some of which can still be found.

V. L. THORNTON,
Affiant.

Sworn and subscribed to before me this — day of October, 1919, in my county and state aforesaid.

[SEAL.] L. N. WEAVER,
Notary Public.

My Com, Expires 8/23/1923.

Affidavit of W. F. Ward in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a Notary Public of and for the county of Middlesex, in the State of Virginia, in said county, W. F. Ward, who being first duly sworn deposes and says:

First. That he is a resident of the town of Urbanna, Middlesex County, Virginia, and *have* lived in said town and county for the past thirty-eight years, and is well acquainted with the complainant, J. W. Hurley, and has known him all his life, and is well
44 acquainted with the oyster business in the Rappahannock River, and *if* fifty-eight years of age.

Second. That J. W. Hurley is a resident of said town and county and has been engaged in the oyster business as a planter and dealer in oysters in the Rappahannock River in Middlesex County for the past twenty years. That he is renter of a large amount of oyster planting ground from the State of Virginia in said river, and has large quantities of oysters and shells planted thereon.

Third. That it was impossible for *an* person holding oyster planting ground to know where the Baylor Line run as it was not marked by buoys or in any way in which a planter might know where it was so that a holder of oyster planting ground might easily have planted oysters on the natural rock without any intent to defraud the State.

Fourth. That a part of the oyster shore now held by J. W. Hurley which lies on the lower corner of the shore which is located between House Bay and Urbanna Creek was originally assigned to my brother, S. Ward by B. F. Hart, Oyster Inspector and surveyed to him by R. L. Blake, County Surveyor, and my brother and I planted a vessel load of shells on the inner edge of the piece of ground, and that I was present when the shells were put over and helped to shovel them overboard and state positively that the vessel anchored on the inner edge of the shore which vessel drew about nine feet of water when loaded and that there was plenty of water for the vessel and that there was about twelve feet of water on the

upper end of the ground on the outer part of it and on the lower end of it which is now the lower end of the shore held and owned by J. W. Hurley, there was about fifteen feet of water, that is on the outer part of it.

Fifth. That the line of stakes marking the outer line of J. W. Hurley's oyster shore are in the same place they were when my brother S. Ward owned this shore as I can tell by the land marks by looking down the line of stakes from Urbanna Creek as they are in a line with Grey's Point.

45 Sixth. That he sold this shore to G. V. Wagenen after the death of his brother, S. Ward, and that G. V. Wagenen organized the Urbanna Fish & Oyster Company from whom J. W. Hurley purchased this shore.

Seventh. That if any part of this shore is natural rock and inside the Baylor Survey, then it is because the oyster inspector and surveyor made a mistake when it was assigned and not because the stakes have been moved out since as they are in the same place they were when it was originally assigned.

W. F. WARD,
Affiant.

Sworn and subscribed to before me this — day of October, 1919, in my county and state aforesaid.

[SEAL.] L. N. WEAVER,
Notary Public.

My Com. Exp. 8/23/1923.

Affidavit of W. F. Gayle in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a notary public in and for the county of Middlesex, in the State of Virginia, in the said county, W. F. Gayle, and being first duly sworn deposes and says:

First. That he is a resident of the town of Urbanna, Middlesex County, Virginia, having lived in said town and county for the past forty years and that he is fifty-seven years of age, and is well acquainted with the complainant, J. W. Hurley, and with the oyster business in the Rappahannock River having been engaged in said business practically all of his life and is still engaged in said business.

46 Second. That J. W. Hurley is a resident of the said town and county, and has been an oyster planter and dealer in oysters on said Rappahannock River for more than twenty years. That he is a renter from the State of Virginia of a large amount of oyster planting ground in said river, and has large quantities of oysters and oyster shells planted thereon.

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Third. That he is familiar with the oyster planting ground now held by J. W. Hurley and has been familiar with it since it was originally assigned by B. F. Hart, oyster inspector, to the parties under whom said J. W. Hurley claims.

Fourth. That a part of the oyster shore now held by J. W. Hurley between Urbanna Creek and Remlik Wharf was originally assigned to him and J. W. Hurley, and that he sold his interest in this shore to J. W. Hurley, that he tonged oysters on the shore now held by J. W. Hurley before the Baylor Line was run and before the shore was originally assigned and has oystered on the rock outside the stakes marking the outer line of J. W. Hurley's oyster planting ground.

Fifth. That he has kept up and stuck the stakes marking the oyster shore of J. W. Hurley for the past fifteen years or longer, and that he always put in the new stakes to mark the shore by the stobs of the old stakes which he could see when restaking the ground, and that he always put the new stakes in the same place as the stobs of the old stakes were, and that he is therefore in a position to know whether the stakes have been moved out since the shore was originally assigned to the parties under whom J. W. Hurley claims, and that he states positively that the stakes marking the outer line of J. W. Hurley's oyster shore are just where they were when this shore was originally assigned.

Fifth. That J. W. Hurley always instructed him to be careful when sticking the stakes not to get them out beyond where the original stakes were and that he always followed these instructions when restaking both pieces of J. W. Hurley's oyster shore.

47 Sixth. That he was present and helped to plant oysters for the Urbanna Fish & Oyster Company on the shore which the company sold to J. W. Hurley, and that the vessels from which the oysters were unloaded, anchored on the shore inside the stakes, and that the water inside the stakes was deep enough for the vessels which drew from seven to nine feet of water.

Seventh. That he knows that J. W. Hurley planted on the oyster shore which he holds lying between Urbanna Creek and Hog House Bay, from the Spring of 1917 to the fall of 1918, between twelve and fifteen thousand bushels of oysters in addition to large quantities of shells and that most of these oysters and shells were planted on that part of this shore which the Commission of Fisheries of Virginia contend is natural rock and inside the Baylor Survey and that these oysters and shells have not been taken up by J. W. Hurley and are now on the shore.

Eighth. That J. W. Hurley has planted on his oyster shore, which lies between Remlik Wharf and Urbanna Creek, several vessel loads of oysters and that most of them were planted on that part of the shore which the Commission of Fisheries contend is natural rock and inside the Baylor Survey.

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Ninth. That the oyster shore of J. W. Hurley which lies between Remlik Wharf and Urbanna Creek was originally assigned to J. W. Hurley and C. S. Burton before the Baylor Line was run with the exception of a small jib shaped piece of ground which lies on the outer part of this ground, which was assigned to J. W. Hurley and the affiant, after the Baylor Line was run, and it was found that this small jib shaped piece of ground was outside the Baylor Survey, and that J. W. Hurley purchased C. S. Burton's interest in this shore and also the interest of the affiant in the jib shaped piece of ground.

Tenth. That he was on Remlik Wharf when the Baylor Line was run and states positively that the stakes now marking the outer line of the jib shaped piece of shore are where they were when this shore was assigned to the affiant and J. W. Hurley, by B. F. Hart, Oyster Inspector.

48 Eleventh. That he knows that J. W. Hurley will lose a large sum of money, if that part of his shore which the Commission of Fisheries contend is natural rock, is turned out to the tongers without first giving J. W. Hurley an opportunity to remove the oysters and shells which he has planted.

W. F. GAYLE,
Affiant.

Subscribed and sworn to before me this 23rd day of October, 1919, in my county and state aforesaid.

L. N. WEAVER,
Notary Public.

[SEAL.]

My Com. Exp. 8/23/1922.

Affidavit of R. W. Franklin in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a notary public in and for the county of Middlesex, in the State of Virginia, in the said County, R. W. Franklin, and being first duly sworn deposes and says:

First. That he is a resident of the town of Urbanna, Middlesex County, Virginia, having lived in said town and county for the past forty-five years and that he is now sixty-six years of age, and is well acquainted with the complainant, J. W. Hurley, and with the oyster business in the Rappahannock River having been engaged in the oyster business for the past forty or fifty years, and is still engaged in said business.

Second. That J. W. Hurley is a resident of the said town and county and has been an oyster planter and dealer on said Rappahannock River for more than twenty years. That he is a renter

from the State of Virginia of a large amount of oyster planting ground in said river, and has large quantities of oysters and oyster shells planted thereon, and

49 Third. That he was an oyster inspector for the district comprised between Hog House Bay and La Grange Creek in said Rappahannock River prior to the time the Baylor Survey was made, and that the oyster planting ground of said J. W. Burley which he now holds is located in this district, and

Fourth. That he was one of three commissioners appointed by G. T. Garnett, Judge of the County Court of Middlesex County, Virginia, to determine what bottoms in said river in said county were natural oyster beds, rocks or shoals, and

Fifth. That he was with Captain Baylor when the Baylor Line was run marking the natural oyster beds, rocks or shoals in the Rappahannock River in Middlesex County, Va., and that he applied for and had assigned to him by B. F. Hart, oyster inspector, a part of the oyster shore now owned by J. W. Hurley which he sold to J. W. Hurley, and that this shore was located between Urbanna Creek and Hog House Bay in said Rappahannock River, and was present when the other oyster planting ground which J. W. Hurley holds was assigned to the parties under whom J. W. Hurley claims, and

Sixth. That when the Baylor Line was run it was not marked by buoys or permanent marks so that it was impossible for any owner of oyster shore to know where the Baylor Line run, and

Seventh. That when he applied for and had assigned oyster planting ground to him that the inspector prior to assigning it did not establish the Baylor Line, but that the inspector looked at the stakes marking the ground applied for, and if he thought they were out too far he made him move them in, but if he did not think they were out too far he directed the surveyor to survey the shore and give the applicant a plat of it, and that the inspectors went by what they thought was outside the Baylor Survey in assigning oyster planting ground and not by what they knew was outside the Baylor Survey as they did not attempt to establish the lines of this survey, and

Eighth. That he is familiar with the oyster planting
50 ground held by J. W. Hurley which comprises two pieces as follows: 1st, a piece of shore lying between Urbanna Creek and Hog House Bay, and 2nd, a piece which lies between Urbanna Creek and Remlik Wharf, that he has oystered on the rock outside this shore since it was originally assigned and has been passing by the stakes marking its outer boundary, and that he would know if the stakes had been moved out since they were originally stuck, and

Ninth. That he positively states that the stakes now marking the outer line of J. W. Hurley's oyster shore are just where they were when the shore was originally assigned to himself, Wagnen, Frank-

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lin, C. S. Burton, J. W. Hurley, Gayle and others under whom J. W. Hurley claims, and

Tenth. That he does not state that all of the oyster shore of J. W. Hurley is outside the Baylor Survey, but does state that the stakes marking the outer line of the shore are where they were when the shore was originally assigned by B. F. Hart, Oyster Inspector, to the parties under whom J. W. Hurley claims, and

Eleventh. That he knows that J. W. Hurley planted on his oyster shore, which lies between Urbanna Creek and Hog House Bay, during the years 1917-1918, a great many oysters which he has never taken up and most of these oysters were planted on the outer part of this shore which the Commission of Fisheries contend is natural rock and inside the Baylor Survey, that he also knows that J. W. Hurley planted on his shore, which lies between Remlik Wharf and Urbanna Creek, several vessel loads of oysters the greater part of which were planted on the outer part of this shore which the Commission of Fisheries contend is natural oyster rock and inside the Baylor Survey, and that these oysters have not been taken up and are now on the shore, and that J. W. Hurley has, in addition to the oysters planted on these two pieces of shore, planted large quantities of shells on the outer part of his shore which it is contended is natural rock.

51 Twelfth. That J. W. Hurley will lose a large amount of money if that part of his shore, which the Commission of Fisheries contend is natural rock, is turned out to the public tongers without first giving him an opportunity to remove the oysters and shells which he has planted.

R. W. FRANKLIN,
Affiant.

Subscribed and sworn to before me this 23rd day of October, 1919, in my county and state aforesaid.

[SEAL.] L. N. WEAVER,
Notary Public.

My Com. Exp. Aug. 23rd, 1922.

Affidavit of J. W. Hurley in Behalf of Complainant.

Filed October 30th, 1919.

This day personally appeared before me, L. N. Weaver, a notary public in and for the county of Middlesex, in the state of Virginia, in the said county, J. W. Hurley, and being first duly sworn deposes and says:

First. That he is a resident of the town of Urbanna, Middlesex County, Virginia, and is fifty-seven years of age, that he has resided in Middlesex County, Virginia, since he was eighteen years of age, that he has been engaged in the oyster business as a planter and

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dealer in oysters on the Rappahannock River for more than twenty years.

Second. That he holds at the present time two pieces of oyster planting ground in said river one of them located between Urbanna Creek and Hog House Bay, and the other one between Remlik Wharf and Urbanna Creek.

Third. That he purchased the first piece of oyster planting ground from R. W. Franklin, G. V. Wagnen and the Urbanna Fish and Oyster Company and that the other piece of ground was as-
52 signed to him and C. S. Burton before the Baylor Survey was run with the exception of a small jib shaped piece of ground which is on the outer part of it which was assigned to him and W. F. Gayle after the Baylor Line was run and it was found that this jib shaped piece of ground was outside the Baylor Survey.

Fourth. That he has paid taxes on both pieces of shore for each year up to and including the present year which he paid in September, 1919, that he was granted permits in the past to dredge this ground.

Fifth. That there was no way in which a holder of oyster planting ground could tell where the Baylor Line Run, and that therefore a planted might, by mistake, have held ground inside the Baylor Survey without knowing it and without any intent to defraud the State.

Sixth. That he always instructed his men when the shore was restuck to be careful to not get the stakes out any further than they originally were, and that his men always told him that they restuck the ground by the old stakes the stobs of which they could see.

Seventh. That he has every reason to believe that the stakes now marking the outer line of his oyster shore are just where they were when this ground was originally assigned to the parties from whom he purchased it, and if any part of his oyster planting ground is inside the Baylor Survey, he believes it is there because the inspectors made a mistake when it was originally assigned as none of the inspectors ever told him that his stakes were too far out.

Eighth. That part of his oyster shore which he purchased from the Urbanna Fish & Oyster Company was used by said Company for oyster planting, the company paid rental to the State, they were permitted by the Board of Fisheries to dredge it, that he had every reason to believe that it had been assigned to the Company, and that when he purchased it from said Company, he depended on his attor-
53 ney, W. H. Ryland, to look after his interests and see that he was getting a legal title to it, and thought that W. H. Ryland had attended to this until the present controversy began, that W. H. Ryland, his attorney, was at one time Secretary of the Commission of Fisheries of Virginia, after the affiant purchased this shore from the Urbanna Fish & Oyster Company, and never told the affiant but what his title to this shore was good.

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Ninth. That he has planted on his shore, which lies between Urbanna Creek and Hog House Bay, between ten and twelve thousand bushels of oysters in addition to large quantities of shells, and most of these oysters and shells were planted on that part of this ground which it is contended is natural rock. These oysters were planted from the Spring of 1917 to the Fall of 1918, and are now on the shore as he has had no opportunity to take them off.

Tenth. That he planted on his oyster shore which lies between Remlik Wharf and Urbanna Creek several vessel loads of oysters in addition to large quantities of shells, and most of these oysters and shells were planted on that part of this shore which the Commission of Fisheries of Va. contend is inside the Baylor Survey. These oysters and shells are still on this shore as he has had no opportunity to remove them.

Eleventh. That there are a number of other oyster planters and dealers in oysters who are in the same position as he is, who without any intent to defraud the State, are holding oyster planting ground in the Rappahannock River and other rivers of Virginia, on which they have planted oysters and shells on parts of their shores which the Commission of Fisheries contend is inside the Baylor Survey.

Twelfth. That if the Commission of Fisheries of Virginia does not permit him to remove his oysters and shells, which he has planted on that part of his shore which said Commission contends is inside the Baylor Survey, before it is turned out to the public, then this affiant will lose between eight and ten thousand dollars, and tongers
54 will be permitted to take and sell oysters which your affiant paid for and planted in good faith.

J. W. HURLEY,
Affiant.

Subscribed and sworn to before me this 23rd day of October, 1919.
[SEAL.] L. N. WEAVER,
Notary Public.

My Com. Exp. 8/23/1922.

Affidavit of N. D. Lockley in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,
County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, N. D. Lockley, who being duly sworn, deposes and says as follows:

My name is N. D. Lockley, and I am 58 years of age. I have lived in and around Urbanna all of my life. I used to own a piece of oyster ground, three acres and a fraction, near the mouth of Urbanna

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Creek, in partnership with Thomas Cook. That ground is now the Western piece owned by Thornton, but this is not the whole piece that he has, for our line did not run beyond the Baylor Survey. Our outshore line of stakes *were* in water between five and seven feet deep. The character of the oyster bottom, both natural rock and planting ground, is not as good at this point as it is further to the Eastward, there being more mud and the part that is rock being broken up in muddy slues. This ground was not profitable to me and long since I sold it to Webb. Further down on Hog
55 House Bar the ground lying within the Baylor Survey has a hard sandy bottom, what we call in the river here Sandy rock or inshore rock, and the best oysters grow on that kind of ground. On the Baylor line the ground is grassy and the oysters that grow there are the kind that are found, generally, on grassy bottom in the Rappahannock River. They have a dark shell, thin shell, sharp pointed and grow in bunches—they are rough oysters. The oysters that grow on Hog House Bar, natural rock ground, are smoother, whiter, thicker shells, and are better oysters in every way. I have oystered on all of this ground, long before the Baylor Survey was thought of, and know the bottom thoroughly. Mr. Wagner afterwards got charge of all of this ground, that is from Thornton to the East. I remember the time, though not the day, that he stuck up the ground to the Eastward of the point on Hog House Bar, not far from where the old schooner went aground. His line used to be inside or to the West of the schooner, and he moved it a long ways to the East. I spoke to Mr. Segar, the oyster inspector, about it and told him that Mr. Wagner had taken up a lot of the natural rock. He said he thought so, that he applied to him for it and that he would not rent it to him, but he would have to get the Board of Fisheries to have a survey made to move him. This was ten years or more ago. At that time oystermen were all talking about this thing that Mr. Wagner had done, not only on the piece to the East, but his coming out all along his North line further into the stream. At this time we have to use 20 and 22 foot tongs to work on the outside of Mr. Hurley's ground to the Eastward and with as much as 18 foot tongs on his Northern line, up near Urbanna Creek. We used to work comfortably all along the Baylor line with a sixteen foot pair of tongs, and had plenty of wood out of the water so that we would not have to stoop. None of this ground that Mr. Hurley has that lies within the Baylor Survey was ever depleted rock. Oystermen were working there right up to the time Wagner staked it up and put them off, and they have never stopped working all around the
56 outside of the stakes as they are now stuck. I have worked around Mr. Hurley's North line, his East line and around along the hook, from his inshore line to the line of the Baylor Survey as it runs from Hog House Bar to the Southward, and I have seen many other oystermen working there and catch, as I did, from seven to twelve bushels of oysters, worth sixty cents a bushel. Good wages can still be made on this rock and the part that we work on now is no better, and never was any better than the part Mr. Wagner

staked up, in fact, not as good, because it is known that the rocks are better in shoaler water than in deep water in the Rappahannock.

And further this deponent saith not.

N. D. LOCKLEY.

The foregoing deposition of N. D. Lockley was duly sworn to and subscribed before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

My commission expires August 23rd, 1923.

L. N. WEAVER,
Notary Public.

Affidavit of A. E. Segar in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,
County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, A. E. Segar, who being duly sworn, deposes and says as follows:

About twenty years ago I was Oyster Inspector for the District of Middlesex, then 18-B, now 27, lying East of Urbanna Creek. My attention was frequently called by various people to oyster
57 ground opposite Rosegill Farm, and the general complaint was that the oyster stakes were out too far in the river, that is to say, they included a part of the Baylor Survey as the general contention was, and my opinion then and now is that these stakes did include a part of the natural rock.

On one occasion a man named George Wagner, who owned a piece of ground on the Eastern end of Hog House Bar, opposite the Rosegill Farm, made an application to me to assign him some more ground, and I came up to this position with the County Surveyor for the purpose of looking at the ground that Mr. Wagner had applied for, although I was satisfied in my mind that it was natural rock and that I would after an investigation not assign it to him, but as an officer felt it was my duty to look into the matter carefully and pass upon the question after getting proper evidence as to whether the ground was natural rock or not, and it is for this reason that I went to the place with the County Surveyor. While standing on the shore, waiting for Mr. Wagner, a boat came out of Urbanna Creek and towards the Eastward, down on to the ground that we were in front of, and a man stuck stakes on this ground which were, I am confident from my knowledge of the location, stuck quite a considerable distance to the Eastward of the Baylor Line as it is defined at Hog House Bar. I was convinced at the time that the man in the boat was Mr. Wagner staking up the ground so that it could be surveyed, but he never came to me afterwards to get the assignment, and later in the day, bad weather coming up, I got in my boat and went home. Subsequently, in passing along by this piece of ground, I

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observed where the stakes had been stuck and felt perfectly confident that they had been stuck taking in a portion of the natural rock, and I made a report to the then Board of Fisheries and asked them to have this ground surveyed so as to turn back to the public that part of the public bottom that I felt Mr. Wagner had improperly taken into his possession. I have examined, this morning, a map made by Mr. Fred E. Roediger, dated November 30th, and I
58 am satisfied from an inspection of this map, that the ground that Mr. Wagner staked in is the ground to the Eastward of the dotted line running from a point on the map Southwardly. It will be noticed by looking at this map that this piece of ground extends to the Eastward from the ground of Hog House Bar, which is ground that was properly and legally assignable.

By inspecting this plat just above referred to, I am satisfied, from my familiarity with the ground and also with the Baylor Survey, because I have a plat of the Baylor Survey and used it on all occasions during the twenty years that I occupied the position of Oyster Inspector, that the dotted line on the plat which I am now examining correctly defines the Baylor Survey, and I am also fully satisfied that various people who formerly owned oyster planting ground opposite the Rose Gill Farm, which ground is now owned by Mr. J. W. Hurley, depredated on the natural rocks by extending their stakes beyond the point to which they had a legal right to, and indeed, I know that on one occasion a man named Shelton, who owned a part of this ground, went so far out into the public ground that I made him remove his stakes, and even at that time I was of the opinion that others had gone on the natural rock, but as a number were on line together, I only made Shelton go back as far — those other individuals were, my hope being that the Board would have a re-survey of all this ground, and put the stakes where they ought to be.

And further this deponent saith not.

A. E. SEGAR.

The foregoing deposition of A. E. Segar was duly sworn and subscribed to before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

My Commission expires August 23, 1923.

L. N. WEAVER,
Notary Public.

59 *Affidavit of O. J. Palmer in Behalf of Defendants.*

Filed October 30th, 1919.

VIRGINIA,

County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, O. J. Palmer, who being duly sworn, deposes and says as follows:

I took up a piece of oyster planting ground on Hog House Bar with Mr. Ward. This was about a year or two after the Baylor

Survey was run, and it is the same ground that was afterwards owned by Mr. George Wagner. I sold out to Mr. Ward and he sold out to Mr. Wagner. Mr. Wagner to a company and the company to Mr. Hurley. Mr. Hurley bought other ground to the Westward of the Wagner ground. When Mr. Ward and I took up the piece of ground spoken of, which, as I recollect, contained about fourteen acres, our outshore stakes were just on the edge of the Baylor Survey line. They were in nine feet of water. I planted seven loads of oysters on this ground for the company, Wagner at that time being the president or manager. These loads contained from twelve to eighteen hundred bushels. My boat drew seven and one half feet of water and I had to be careful when I went in there to keep her from going aground, and I could not go in there on certain winds. Recently I measured the ground that Hurley is in possession of off the lower end of Hog House Bar, and found that the water was seventeen feet deep at his stakes. I put my tongs down right by his stakes and afterwards measured the tongs with a two foot rule, and the depth of water was just seventeen feet. This was not at exactly low water, but as the rise and fall of the tide in Rappahannock River is only about eighteen inches, it did not make much difference whether the tide was high or low.

I also remember the watch house that used to be on the ground that was sold by us to Wagner. It stood about sixty feet
60 inside of the outer line of stakes as they were put by us when we rented the ground from Mr. Hart, the Oyster Inspector. Before that house had rotted down the stakes had gone out two hundred feet further than the watch house—where the watch house had formerly stood—and where the stakes were still showing in the water.

That there might be no misunderstanding about this, I want to say the watch house was built by Mr. Wagner. I do not know whether the stakes were in their old positions after the watch house was built, but I do know that when I was running oysters there, which was after the watch house had been built, I could not go in on the ground unless the wind was to the Southward. Any other quarter would be apt to put me on the shore, because the depth of the water inside of the stakes was not enough for safety. In other words, I required seven and one half feet of water and there was not enough water then to swing to safely.

I have often, in sailing over the ground, seen the stubbles of the old stakes that were set inside of Mr. Hurley's outshore line of stakes. You can sail over the ground now, after cold weather has made the water clear, and you can see the different line of stakes inside of his present outshore line of stakes.

I have just looked at the plat made by Mr. Ruediger, dated November 30th, 1918. I was the first man that ever owned a portion of the ground between Urbanna Creek and Remlik's Wharf. When I owned it it was right in on the grass. In examining the plat I recognize that my ground was inside of the dotted line. The Baylor Survey gave more ground for rental than I originally had. The straight line showing the ground now occupied by Mr. Hurley, shows that he is outside of the rental grounds and trespassing on the

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Baylor Survey. I judge, from my knowledge of those waters,
61 that he is in about fourteen feet of water, whereas along the Baylor Line he would only get about nine feet.

And further this deponent saith not.

O. J. PALMER.

The foregoing deposition of O. J. Palmer was duly sworn to and subscribed before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

My commission expires August 23, 1923.

L. N. WEAVER,
Notary Public.

Affidavit of John Webb in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,
County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, John Webb, who being duly sworn, deposes and says as follows:

My name is John Webb, age 61 years. I have lived about one mile and a half from Urbanna all of my life, and have been an oysterman ever since I was old enough to work on the water. I was one of the first people to take up ground off shore from the Rosegill Farm. My piece was down between the mill stream and the broken bank, and afterwards the ground that Mr. Wagner had was taken up still further to the Eastward of me. He was off shore of me, that is to the Eastward of me. I mean lower down the river, not outside in the sense that he lay between me and the middle of the river. My outshore line ran even with the inshore line of the Baylor Survey, as we understood it at that time. Mr. Hart assigned the ground to me and others, and we aimed to get right up against the South-
ward line of the Baylor Survey. We were then in six feet of
62 water at low tide. The bottom was grassy, and the kind of oysters that grew on it were dark shells, were bunchy and sharp pointed. They were not at all like the oysters that grew on the other side of the Baylor Survey on the natural rock. The oysters there were whiter, thicker shells, rounder, better in quality and altogether different looking. Those oysters were what we call Sandy Rocks, and are about the best quality of oysters that grow in the Rappahannock River. The inshore rocks in the Rappahannock River produce better oysters than either the deep water rocks or the grassy lands. After being on this ground for sometime, we all decided that we were going out a little further and so we decided to stick out together, but a man named Shelton, whose ground lay inside of mine, stuck up so far on to the natural rock that Mr. Segar, then Oyster Inspector, noticed it and got after him and made him stick his stakes back, but he only stuck them back in line with the balance of us who had assignments at this place. We all stayed on the natural rock for sometime, but nothing like as far out as Mr.

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Hurley now is. We went a little ways on the rock, because the ground we had was very poor and didn't grow oysters well, but he is now out an acre beyond the line that Mr. Hart gave us. I mean by that seventy yards further out than the Baylor line, and this seventy yard strip that he has will run all along his whole front, in some places more than seventy yards, I should say, and in none any less.

Mr. George Wagner had a piece of ground further down the river, as I have said, than mine. He adjoined me on the eastward. I remember the day that he stuck up the piece of ground lying to the eastward of the Baylor line where it turns and runs towards the south. I was in Urbanna that day. He had a very large canoe, and it was a bad day as I recall it. We were not out oystering because of the weather. The next day, or maybe two days afterwards, we went out in the river to oyster and we all made 'mirations' about his having taken up this ground, and he told us that it had been assigned to him, and notified us not to go on it any more.

63 An old schooner, named the "Freeman" went ashore on the southeast end of Hog House Bar, near what we call the Hook. Mr. Wagner's stakes were at one time to the westward of that old wreck. Now they are a long ways to the eastward. Anyone who knows this shore could understand how a man working on it would know it just as well as a piece of high land, because the water falls off fast on the outshore side of the Hog House Bar, deepening so rapidly that you might say it is straight up and down.

And further this deponent saith not.

JOHN WEBB.

The foregoing deposition of John Webb was duly sworn to and subscribed before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

My commission expires August 23rd, 1923.

L. N. WEAVER,
Notary Public.

Affidavit of F. E. Ruediger in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,
County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, F. E. Ruediger, who being duly sworn, deposes and says as follows:

My name is F. E. Ruediger, age 56. I am Civil Engineer for the Commission of Fisheries of Virginia, and have been employed by the Commission of Fisheries before that time as Official Surveyor for them. I am also County Surveyor of Accomac County since 1899.

I have worked for the Board of Fisheries in my professional
64 capacity since the organization of the first Board, and have been steadily employed in re-surveying work for the present

Commission for about a year. In the fall of 1918 I was told that a petition had been filed by certain citizens of Middlesex County, complaining of ground then and now held by Mr. J. W. Hurley of Urbanna, Virginia. I received this information in the Office of the Commission of Fisheries at Norfolk, Virginia, and was directed to proceed to Middlesex County and to notify Mr. Hurley that the Commission intended to re-trace the Baylor line at his properties to ascertain whether or not he was in possession at that time of a part of the natural rock. I proceeded to Middlesex County, saw Mr. Hurley, told him what my business was and asked him to point out to me all the oyster planting ground held and claimed by him at this location. This he did before I began to re-trace the Baylor line. My first act was to survey all of the ground claimed and held by Mr. Hurley on both the east and west sides of Urbanna Creek. I made this survey after he had shown me the lines claimed by him. The lines were not shown to me by Mr. Hurley individually, but by a man he sent with me in a boat furnished by him. After surveying the two parcels of ground claimed by Mr. Hurley, I then re-traced the Baylor line, which, in each instance, runs through the area now claimed by Mr. Hurley, a part of which is the subject of the suit now pending in the United States Court at Richmond, Virginia. I made the plat from which a blue print was made which is referred to in the answer of the Commission of Fisheries, and is marked Exhibit "F. E. R. No. 1." This plat bears my name and is dated November 30th, 1918. The plat as then made did not show all the lines that the present blue print shows. What I showed Mr. Hurley before the first hearing took place in Norfolk was a survey of the ground in his possession according to the lines his man had shown me, through which area, as I have said, ran the line of the Baylor Survey. Mr. Hurley then said to me: "I have made a mis-
65 take and have had you survey too much ground. I claim the outer part of the ground under the assignments that I now have, and I made application to the inspector for the inner part of the ground within my stakes. This application is now posted." I then, at Mr. Hurley's request, ran the lines which go through each parcel from east to west in a general direction, called the second inner lines on the plat. This change in the plat, as I had prepared it, was made entirely at Mr. Hurley's request and for the reason given. The area to the eastward of the mouth of Urbanna Creek shown me by Mr. Hurley's agent, as the territory claimed by him, is bounded by the points 4, 5, 6, 7 and 4. The area to the west of the mouth of Urbanna Creek, which Mr. Hurley holds possession of, is marked by the lines between the points 1, 2, 3, 4, 5, 6, 7 and 1. The total acreage of the easter-most parcel is 54.55 acres, and the acreage of the wester-most parcel is 36.50. The separate areas are shown on the blueprint, and the area of each parcel of natural rock held by Mr. Hurley is shown on the blueprint. He has in his possession 26.90 acres of natural rock to the eastward of the mouth of Urbanna Creek, and five acres of natural rock to the west of that creek.

When I started to re-locate the line of the Baylor Survey I procured a plat of that Survey and the notes. I will now trace from the

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original notes just how I proceeded to relocate the line. By reference to the official publication of the Baylor Survey for Middlesex County, page 9, a copy of which is herewith filed, marked "X-F E. R.", all of the lines of the Baylor Survey at the point under discussion will be found laid down. I also checked these lines by the depth of water, a point given on the Lancaster shore, marked "Rogue-O," and by a similar station at Burhan's Wharf, which is a point eastward of anything on the blueprint filed with the answer of the Commission as an exhibit. These various marks checked the one with the other, so I am sure that the amount of natural rock in the possession of Mr. Hurley is as shown on the blueprint
66 marked "F. E. R. No. 1." As a further check I have observed the depth of water on the outshore line of stakes on the area in the possession of Mr. Hurley, and on the easter-most parcels I found that the water ran to from twelve feet to sixteen feet in depth, proceeding from west to east. The depth on the outshore lines of stakes on the wester-most portion is deeper than that called for in the Baylor Survey, but the difference is much less than in the other parcel, because Mr. Hurley's line of stakes has not been extended so far over on to the public ground. Proportionately the depth is just as much greater, but the distance of the encroachment being less, the depth is also less.

I was present at the second hearing of Mr. Hurley's petition to be given time within which to remove oysters and shells from the two parcels of natural rock held by him, which I described and which are accurately platted on the map marked Exhibit "F. E. R. No. 1," but I was not present at the first hearing on that petition. The second hearing took place in the Town of Urbanna in February, 1919, the exact day I don't remember. Mr. Hurley was represented before the Commission by Colonel Downing and Mr. Lewis. Witnesses were examined on behalf of Mr. Hurley and the citizens who had filed the petition complaining that he was holding natural rock. The Commission did not decide the case that day but took the matter under consideration, and later decided it in Norfolk and published its finding.

This matter had been called to my attention a long time before 1918 while I was engaged in other surveys on the river. Various oystermen had complained to me that some one was in possession of natural oyster rock at this point.

I will attach to this affidavit a plat marked "F. E. R. Exhibit Y," which is a true copy reduced to the scale of the map marked "F. E. R. No. 1," filed with the answer of the Commission of Fisheries. I have reduced the original assignments to the scale of the map
67 made by me and dated November 30th, 1918, for the purpose of comparing it with that map. This map (marked Exhibit Y, with this affidavit), shows the original assignments made by the oyster inspector, or inspectors, of Middlesex County, to various citizens, and these are the parcels of ground that have been purchased by and are now held by Mr. J. W. Hurley. Certain assignments on the Western end of Exhibit "Y" are not now owned by Mr. Hurley and never were, but I have platted them that the entire

area assigned at this point may clearly appear. The three properties shown on Exhibit "Y," that form a part of the ground now held by Mr. Hurley, are the parcels marked "A. Shelton," "R. W. Franklin," and "S. Ward." A fourth piece that is not on the plat I think was owned by one or two darkies and afterwards was purchased by Wagner. I judge this from what I have heard from the oystermen, and not from finding the plat. The mouth of Urbanna Creek has changed very much since these assignments were made, because the Government has, since that time, dredged out the creek at its mouth, and has constructed a stone jetty on one side and a sheath piling jetty on the other, but the properties beginning with the Shelton property, or perhaps with the Thornton property are too far to the Eastward to be affected by these changes, and from the Shelton property East the lines conform with remarkable regularity to the Baylor line. From the plats that I have examined I am satisfied that all of the original assignments were made to the Southward of and with due regard to the Baylor line.

In looking over the assignments recorded in the Clerk's Office of the Circuit Court of Middlesex County I have found no assignment that covers any part of the ground to the Eastward of point 7 of Baylor's Survey line now held by Mr. Hurley, and beyond all question every part of that ground is within the limits of the Baylor Survey, and is natural rock. I am just as positive that all of the ground now held by Mr. Hurley to the Northward of the dotted line lies within the Baylor Survey, that no part of it was ever assigned to him,
68 or his predecessors, in title, and that it is all natural rock.

In examining all of the plats that I have been able to find bearing upon this question I have not found a single one which indicates that any oyster inspector, or surveyor, ever undertook to convey, or assign, or lease to an applicant any portion of any of the ground held by Mr. Hurley to the Northward of the dotted line of the Baylor Survey. In making these researches I have done so with the sole purpose of ascertaining the facts. My instructions from the Commission have been to get all the information on this subject possible, and, to verify it if possible, so that a correct conclusion could be reached by the Commission upon the true facts in the case. I have surveyed virtually every tract of oyster planting ground in the Rappahannock River, except in the County of Essex which I have not yet reached in the work I am doing and I have found almost innumerable cases just like the case now under discussion, and in doing this work I have not found that Mr. Segar, or his predecessor, Mr. Hart, ever assigned an acre of ground within the Baylor Survey, either through mistake or otherwise. Their assignments all indicate that they were made with care and with due regard to the rights of the public as defined by the Baylor Survey. I have found that their assignments as a general thing came up to the Baylor line, or very close to it, but not in a single instance have I found that they erred in crossing that line and assigning to private individuals public rock which they were prohibited by law from assigning. In answer to a suggestion made at one time that a part of the shore of Rosegill Farm was washing away, I want to say that the surveys

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and the appearance of the shore indicate that no such thing has taken place. There is a post and plank breakwater that runs along the shore from a point inside of the Government jetty down the shore towards the oyster planting ground held now by Mr. Hurley. This shows considerable age. I have known the place for eighteen or twenty years, and it was there when I first knew it. It
69 protects all of the shore of the farm that shows any sign of ever having washed. Further down the shore to the Eastward, the shore is protected by Hog House Bar, and opposite that it has not washed, within my experience on the river, to any apparent extent, if at all. And if the shore had washed it would have nothing to do with the line of the Baylor Survey, which can easily be re-run by the lines given on the original plat and the notes of Mr. Baylor.

Before leaving this subject I want to say that my work in the Rappahannock River, and other parts of Tidewater, Virginia, have been adopted by the United States Coast — Geodetic Survey as is attested by numerous letters from that Department now in my possession, the last of which is dated October 13th, 1919.

And further this deponent saith not.

FRED E. RUEDIGER.

The foregoing deposition of F. E. Ruediger was duly sworn to and subscribed before me in the County of Middlesex, State of Virginia, on the 24th day of October, 1919.

My commission expires August 23rd, 1922.

L. N. WEAVER,
Notary Public.

Affidavit of T. H. Cook in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,
County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, T. H. Cook, who being first duly sworn deposes and says as follows:

My name is T. H. Cook, age sixty years. Ever since I was
70 old enough I have been working out in the Rappahannock River, in the neighborhood of Urbanna Creek. I worked on the oyster ground that was discussed up here at the trial sometime ago, before the Baylor Survey and since that time. I remember the watch house on the ground. It was about as far from here as to that man sitting on the wharf, or a little further—I guess about fifty feet, or may be a little more. It was close to the outer line of stakes. In those days the water along the outer line of stakes was about nine or ten feet deep. I get at this because I used to work out there with sixteen foot tongs, and I had a plenty of tongs out of the water to work with without having to stoop. If you work outside of the stakes now with eighteen foot tongs, you can just get by with them.

so I figure that the water all along the outer line of Mr. Hurley's stakes is around sixteen feet deep. Just the other day I was working on the outside of his stakes where his land runs to the eastward of Hog House Bar, and I got eight bushels of rock oysters just outside of his stakes. The place I got them is close to the line of stakes on the Eastward, the line that is numbered five and six. These oysters were in sixteen feet of water. Then I ran across his ground towards the North and dropped on the bottom just outside of his long line of stakes, and there I found water about sixteen feet deep, and got some oysters. This outside line of stakes is a good deal further out than it used to be when other people owned it. I judge the distance is about as far as from here to Mr. West's store, which is on the other side of the Urbanna wharf from where I am now sitting on the boat. The distance, about as near as I can get at it, is about 150 feet. Running over this ground in the winter time, after the water has gotten clear, I have seen some old stakes sticking in the bottom a considerable distance inside of Mr. Hurley's present outshore stakes. These old stubs look to me like lines of stakes that had been stuck up years ago, and according to my recollection they were what is left of those old stakes which used to mark the out-
71 shore line of Mr. Hurley's ground. In the old days I have oystered inside of the present Baylor Survey before it was run, and when nobody had the ground stuck up, and I have oystered outside of the Baylor Line on the ground that Mr. Hurley now has. The oysters and the ground too are different. The water inside of the Baylor line is about nine feet deep, and less, and outside it runs to sixteen feet, as I have said, along the inshore line of stakes. The bottom inside the Baylor line is grassy; outside it is hard and sandy. Oysters that grow in the grass are long and black, or nearly black, and have thin shells. The oysters that grow outside the planting ground are just like other rock oysters—they are lighter in color, with thicker shells and are not so sharp around the bill. Anybody that has oystered a great many years as I have, can tell the difference not only in the ground but in the oysters themselves. Those that grow outside of the Baylor line are natural rock oysters and are entirely different from those that grow inside the grassy ground. On the extreme Eastern end of Mr. Hurley's ground the whole tract sticks into the public rock. The Baylor line makes a turn on the end of Hog House Bar towards the South, and Eastward of that point all of his ground, the inshore part as well as the outshore part, is on the natural rock. The corner that Mr. Ruediger stuck up is the point marked 7. He marked it with a bunch of stakes and the piece of ground that I have been talking about that is entirely inside the natural oyster rock is all that part of Mr. Hurley's ground that lies to the Eastward of the line that runs from the place marked 7 on the map towards the South.

I know the piece of ground that lies to the Westward of Urbanna Creek, on the line of the planting ground, runs from the red beacon up to the edge of the sand. There is a sort of bar there, and then the line runs across the Remlik Wharf. The land that Mr. Hurley

has that is beyond the sand bar is on the natural rock. Down
72 near the end of the sand bar, at a place called Point Lookout, he is much more on the rock than he is nearer the wharf. There is not the same difference between the ground inshore of the Baylor line and the ground outshore of that same line at this place that there is on the East of Urbanna Creek. On the ground near Remlik Wharf the whole bottom is sandy, and as you go outshore more mud is mixed with the sand, but the ground there, both outside and inside the Baylor line, was at one time a natural rock. Before the Baylor line survey was made I have worked on this ground many days in different years, and I used to catch from 20 to 25 bushels of oysters by going pretty well inshore and then working out, then going back inshore and working out again, and having worked all over the inshore I know the character of the whole bottom. When the Baylor Survey was made, the inshore part of that ground where it was hardest and the water was shoaler had been pretty well depleted, and for that reason I guess it was not judged to be a natural rock, but oysters that grow there are pretty much the same inside of the Baylor line and outside. I know though that on a part of the ground that Mr. Hurley now has in his possession, between Point Lookout and the wharf, he is on the Baylor Survey. In other words, he has some of the natural rock in his possession, but he has not gone over there to the extent he has East of Urbanna Creek. I have just been asked the question how I know some of this ground occupied by Mr. Hurley is outside of the place where it is lawful to rent ground. I know it because I have oystered in this immediate place and on this ground all of my life. I was here when the Baylor Survey was made, and while I could not go there and stick stakes on the line, if all the stakes were down, I have seen the stakes since Mr. Ruediger stuck them up again on the Baylor line, and from my knowledge of the ground itself, and all the places around there, like the beacon, the wharf and the sand bar, and other things, I know that Mr. Hurley is over the line considerably at the Eastern end of the extreme point on the sand bar that we call
73 Point Lookout. I can't say just how I could explain that, but from my own knowledge of this particular piece of ground, I know it and I know it as well as I know most anything else.

And further this deponent saith not.

THOS. H. COOKE.

The foregoing deposition of T. H. Cook was duly sworn to and subscribed before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

L. N. WEAVER,
Notary Public.

My commission expires August 23rd, 1923.

Affidavit of J. H. Didlake in Behalf of Defendants.

Filed October 30th, 1919.

VIRGINIA,

County of Middlesex, To wit:

This day personally appeared before me, L. N. Weaver, a Notary Public for the County aforesaid, in the State of Virginia, J. H. Didlake, who being duly sworn, deposes and says as follows:

I have oystered in the Rappahannock River, out of the Urbanna Creek, for the past twenty years; I have examined the plat made by Mr. Ruediger dated November 30th, 1918, and am convinced from my knowledge of the Baylor Survey that the dotted line on the plat is the line of that survey. This morning I went down on the Public oyster rock to the Eastward of the ground marked J. W. Hurley and shown by the figures 5 and 6. I put my tongs overboard and marked how deep they went in the water. They were twenty foot tongs and they stood about four feet out of the water. From this I know, of course, that the water is sixteen feet deep at that
74 point. The tide was then about medium. Now, at medium tide the water along the outside of Baylor's Survey and just along the edge is nine feet or thereabouts. I used to oyster along that line before I went to work on the Steamer "Chesapeake." We then used to use sixteen foot tongs, and close to the inshore line of the Baylor Survey a pair of sixteen foot tongs would stick out of the water as high as my head as I stood working in my canoe. There is another difference too, about the bottom of the ground now occupied by Mr. Hurley and the ground that is properly subject to rental. I know about this because I used to have a piece of ground down in that neighborhood myself. The ground that is subject to rental has a grassy bottom. The ground that is occupied by Mr. Hurley is a part of the natural rock and has a hard bottom, sheily like the rest of the natural rock, and is not grassy like the ground that is open for rental. I do not mean to say that Mr. Hurley has not some ground that is grassy, but that that he has inside of nine feet of water and on grassy bottom is the ground that was rented by the oyster inspectors to the people Mr. Hurley got it from. I used to oyster in front of these various pieces of ground before I went to work on the "Chesapeake." I stayed on her for four years and then came home and went to oystering again, and the first day that I went out I noticed the difference and told other oystermen that pretty soon they would not leave us any ground to work on; that they had gone out from nine to sixteen feet as to depth of water and had taken in a large part of the natural rock at that point.

This is not alone the case with Mr. Hurley. It has been done all up and down the river.

Another reason that I know that these grounds have been stretched out over the public bottom is that there used to be a watch house building on the planting ground, near the outside line; not exactly on the line but close to it. That house has fallen down now, but when I came back after working on the "Chesapeake,"

that house was three or four times as far from the outer line
75 of stakes as it had been when I went away four years earlier, and I know the house had not moved. The stakes had moved—not the house.

I have worked on the ground to the West of Urbanna Creek and know that the line of the Baylor Survey had some curves in it, or some angles, and was not straight from the outer point above the stone jetty to Remlik Wharf, nor did the line of the planting ground go out as far as it goes now. It has not gone out as far at this place as it has on the East side of the Creek, but it is over the line there, and it went out, in my opinion, about the same time that the line went out on the East side of Urbanna Creek. While I was away both of these lines went out considerably, but the biggest grab by far was made to the Eastward of the Creek.

And further this deponent saith not.

J. H. DIDLAKE.

The foregoing deposition of J. H. Didlake was duly sworn to and subscribed before me in the County of Middlesex, Virginia, on the 16th day of October, 1919.

My commission expires August 23rd, 1923.

L. N. WEAVER,
Notary Public.

76 *Opinion of Circuit Judges Pritchard and Woods.*

Filed January 17th, 1920.

WOODS, *Circuit Judge:*

The complainant, J. W. Hurley, asks that the Commission of Fisheries, and the two inspectors named in the bill, be enjoined from removing the stakes and opening to the public two parcels of natural oyster land on the Rappahannock River containing 31.90 acres, until he has been allowed time to remove the oysters planted by him thereon. The injunction is sought on the ground that the complainant is about to be deprived of his property (1) without due process of law, and (2) without compensation.

The Constitution of Virginia provides: "The natural oyster beds, rocks, and shoals, in the waters of this State, shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this State, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals, by surveys or otherwise." The statute law of the state prohibits under penalty the occupancy and the planting of oysters and oyster shells in natural oyster beds, and requires each inspector to demand the removal of all stakes and other obstructions from such beds, rocks or shoals in his territory, and upon failure of the trespasser to comply to remove them himself, 1 Pollard

Code, 1904, Sec. 2153, and Act of 1916. The statute of
77 1892, amended by Act 1894, provided for a survey of all natural oyster beds, to be conclusive evidence that all land within the survey was natural oyster land, and all without was not natural oyster land. The survey made under these statutes, known as the Baylor Survey, is now the authoritative representation of the natural oyster lands of the state. Statutory provision was made for the leasing of other submerged lands and planting or propagation of oysters thereon. The person desiring to lease was required to obtain a location by application to the inspector and having it "ascertained and designated and surveyed" and "marked with suitable stakes," "or by other metes and bounds, courses and distances, having their places of beginning and ending designated by permanent objects on the shore agreed upon between the applicant and inspector." 1 Pollard Code, 1904, Sec. 2137, Amendment of 1916. Complainant in 1903 obtained by assignment leases of several parcels of submerged lands covering as he claims 47.48 acres. The assignments and plats obtained by the original leases, except one very small assignment, were duly recorded. Upon representation that the complainant had his stakes so set as to include natural oyster lands embraced in the Baylor Survey, and that he was planting and gathering oysters thereon to the exclusion of the citizens of the state contrary to law, the Commission of Fisheries in compliance with the statute, had the Baylor lines re-surveyed by F. E. Ruediger the engineer for the Commission. There is no question of the accuracy of this survey of the Baylor lines, or of the demonstration by it that complainant has in possession parcels of natural oyster ground within the Baylor Survey, one of 26.90 acres and the other of 5 acres.

If this were all obviously the complainant would have no ground whatever to assert ownership of the oysters planted by him on the natural oyster rocks of the state. The rule of the common law is well settled that one who in good faith plants oysters on submerged land which is not natural oyster land—on which oysters do
78 not grow naturally—has the ownership of them and may remove them although he has not leased the land from the state; but it is equally well settled that one who plants oysters on natural oyster lands and thus mingles them with the oysters growing naturally is conclusively held to have abandoned them to the public. Grace v. Willetts, 50 N. J. Law 414, 14 Atl. 559; Payne et al. v. Providence Gas Co., 31 R. I. 295, 77 Atl. 145, 23 Ann. Cas. 65, 73; People v. Morrison, 194 N. Y. 175, 86 N. E. 1120, 128 Am. St. Rep. 552; State v. Taylor, 3 Dutcher 117, 72 Am. Dec. 347.

The complainant at the hearing admitted, as was demonstrated by the re-survey of the Baylor lines, that he had planted the oysters on the state's natural oyster grounds; and it followed as a matter of law that they became the property of the state open to the public, unless the complainant could bring himself within the terms of the statutes of 1899 and 1910 hereinafter referred to. In Commission of Fisheries and Others v. Hampton Roads Oyster Packers and Planters Association, 109 Va. 565, the Supreme Court

of Appeals reviewing all of the statutes passed prior to 1909 on the subject held (1) that the Baylor Survey was made by statute conclusive evidence of the area of the natural oyster grounds of the state; (2) that the statutory enactment to that effect was constitutional; (3) that though the duties of an inspector are quasi judicial, neither he nor any other official can confer exclusive rights to oyster land within the survey by assignment or otherwise. The correctness of these conclusions is made so clear both on principle and authority by the reasoning of the court and the authorities cited that further discussion would be superfluous. The complainant having under the common law no legal interest in the land or the oysters could not allege the statute under which the Commission of Fisheries ordered the natural oyster land opened to the public to be unconstitutional, on the ground that it did not provide that he should have notice and a hearing. Having by the common law no property in the oysters planted, complainant
79 had nothing to be compensated for, or to be protected by due process of law, unless he can show a property right conferred by the statute law of Virginia.

In this situation he invoked and relied upon the following statutes of 1899 and 1910, under which he applied to the Commission of Fisheries to be allowed to remove the oysters: "When, by any re-survey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, *without his own default*, and *by mistake of any officer of the state, has assigned to him and included in the plat of his assignment* any portion of the natural oyster beds, rocks or shoals as defined by law and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground." After two full hearings in which testimony was taken and argument made, the Commission of Fisheries decided that complainant had not brought himself within the conditions imposed by the act of 1910, and refused to allow him to remove oysters from the natural oyster land occupied by him.

The complainant cannot be heard to allege the unconstitutionality of a statute he has himself invoked and relied on. Williams v. Eggleston, 170 U. S. 304; Chicago &c. Railroad v. Nebraska, 170 U. S. 57; Kansas City &c. R. R. Co. v. Stiles, 242 U. S. 111; Kryger v. Wilson, 242 U. S. 171.

The clause we have italicized shows that the state has conferred on a holder the right to remove oysters which he has planted on
natural oyster ground on these express conditions: (1) The
80 natural oyster ground must have been assigned to him and included in the plat of his assignment; (2) it must have

been so included without his fault; and (3) it must have been so included by the fault of an officer of the state.

The evidence relied on to show assignment of the ground to complainant's predecessor under the lease is contained in affidavits to the effect that Hart, who was inspector at the time, was a very careful and diligent official; that the stakes were never removed from their original location; and that Hart would not have allowed them within the Baylor line if he had not made the mistake of assigning the ground within the stakes to the lessees. Against this affidavits were submitted by the defendant to the effect that before complainant got the leases the stakes had been intentionally placed further out, within the Baylor survey and that the stubs of the old stakes nearer the shore are still to be found. Any possible doubt on this point, however, is entirely dispelled by the affidavit of Ruediger the engineer in which he states: "In examining all of the plats that I have been able to find bearing upon this question I have not found a single one which indicates that any oyster inspector, or surveyor, ever undertook to convey, or assign, or lease to an applicant any portion of any of the ground held by Mr. Hurley to the northward of the dotted line of the Baylor Survey. In making these researches I have done so with the sole purpose of ascertaining the facts. My instructions from the Commission have been to get all the information on this subject possible, and to verify it if possible, so that a correct conclusion could be reached by the Commission upon the true facts in the case. I have surveyed virtually every tract of oyster planting ground in the Rappahannock River, except in the County of Essex which I have not yet reached in the work I am doing and I have found almost innumerable cases just like the case now under discussion, and in doing this work I have not found that Mr. Segar, or his predecessor, Mr. Hart,
ever assigned an acre of ground within the Baylor Survey,
81 either through mistake or otherwise. Their assignments all
indicate that they were made with care and with due regard to the rights of the public as defined by the Baylor Survey. I have found that their assignment as a general thing come up to the Baylor line, or very close to it, but not in a single instance have I found that they erred in crossing that line and assigning to private individuals public rock which they were prohibited by law from assigning."

The conclusive proof that the natural oyster ground held by complainant was never assigned nor surveyed, as ground leased to complainant or his predecessors, and that his occupancy was not due to mistake of an officer, leaves the complainant outside of the confines of the statutes of 1899 and 1910, and without any right he can assert under them. The testimony is far from convincing that complainant has been himself without default inasmuch as the assignments and plats were matters of public record; but is is not necessary to decide that point, since he has failed to meet the other two conditions of the statute.

The case then comes to this: When the complainant planted oysters on the natural oyster land they became the property of the

state under the common law. To relieve from possible hardship, the state by the statute last quoted conferred the right of a holder to remove the oysters on conditions set out in the statute. The statute does not take away any property or injure any property right; on the contrary it confers rights on the conditions set out. When the state creates and confers rights not before in existence it may attach to them any conditions, and those who claim the benefits of the statute must accept its conditions. Cooley's Constitutional Limitations, 181. Since the bill, affidavits and exhibits show that the complainant has no property right, either at common law or under the statute, to be taken without compensation or without due
82 process of law, he is not injured by any of the statutes relating to the matter and will not be heard to assert their invalidity. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S. 151; Louisville & Nashville R. R. Co. v. Finn, 235 U. S. 601; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571; Hendrick v. State of Maryland, 235 U. S. 610; Mallinckrodt Works v. St. Louis, 238 U. S. 41.

Fortunately this conclusion works no hardship on the complainant. Taking the most favorable possible view of his case he has no substantial equity. The land from which he has unlawfully excluded the public has never been assigned to him or his predecessors and no rent has been paid for it. The total area claimed by him and in his possession as ascertained by Ruediger's survey is 91.05 acres. The bill alleges he has been paying rent on 47.48 acres in two tracts, 21.98 acres and 25.5 acres. This taken from the 91.05 in his possession leaves more than the 36.50 acres of natural oyster ground in his possession for which he has paid no rent.

Nor will there be any unjust advantage to the state or the public in opening this natural oyster ground to the public. True complainant planted the oysters and will be deprived of the exclusive right to gather them; but it is also true that he has for fifteen years appropriated to his own use all the natural oysters on the land which were the property of all the people of the state.

The injunction is denied and the temporary restraining order revoked.

I concur.

J. C. PRITCHARD,
U. S. Circuit Judge.

83 *Dissenting Opinion of District Judge Waddill.*

Filed January 17th, 1920.

WADDILL, *District Judge* (dissenting):

I regret my inability to concur with my brethren in either their determination of the facts, or their conclusions as to the law properly applicable and controlling upon the application for the injunction prayed for.

From my view of the case, the very least the complainant is entitled to, is to be allowed a reasonable time within which to remove

his oysters and oyster shells planted by him within the disputed area, that is, upon the natural oyster rocks found to be within the land as staked off, and rented to the complainant, the defendant's contention being that these stakes had been changed since they were originally placed, and extended out into territory forbidden to be leased, or to be used other than by the public generally, for tonging oysters naturally grown thereon.

The complainant, and those under whom he claims, have for a period of more than twenty years, been engaged in planting and raising oysters in the waters of the Rappahannock River, upon certain small lots of land formerly leased and set aside to them by the State, paying for said lands a yearly rental of one dollar per
84 acre. The land was regularly surveyed, plotted and staked off by the State's representatives, and from that time until the beginning of this controversy, some two years ago, the rent was regularly paid each year, and the work of planting and propogating oysters thereon, and catching, marketing and disposing of the same, was openly carried on, always under the eyes, and with the full knowledge of the State's oyster inspectors, and others properly having the right of supervision and direction of what was being done.

The controversy over the right to occupy all the lands claimed by the complainant, came about this way: After he had held and uninterruptedly occupied the same, paying regularly his rentals therefor for many years to the State, a proceeding was inaugurated by ten citizens before the defendant Board of Fisheries, pursuant to the provisions of Section 39 of the State's General Oyster Law, approved March 17, 1910, asking a re-survey of the lands of the public oyster grounds within the territory occupied by the complainant, with the result that the Board, without perhaps giving either the formal notice to those to be affected, or according them such a full and formal hearing as the law contemplated, found that portions of the ground within complainant's boundary, as staked off, was a part of the natural oyster rock or bed, and hence not subject to be leased to, or used by the complainant. Upon the Board's action being announced, the complainant, pursuant to another provision of the State oyster law, section 15, asked to be allowed a reasonable time within which to remove from the disputed territory, his oysters and oyster shells planted thereon, which request the Board denied. Sections 39 and 15 are as follows:

"39. Surveying and re-surveying planting-grounds; and making lines of geodetic survey.—The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms as may be agreed upon, any surveyor, or surveyors, to survey, or re-survey, any oyster planting grounds, either in his own or any other county, and to re-establish and permanently mark any line
85 or lines of the Baylor geodetic survey, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor geodetic survey re-established and permanently marked, provided a bond and security be given to the Commission of Fisheries

that the applicants will pay all costs for surveying and marking; and provided further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby; and if it should turn out that it was not necessary, in the opinion of the Commission, to have said line or lines re-established, then all costs of the survey and marking shall be borne by the applicants; but if it shall appear that the Baylor geodetic survey had been encroached upon, then the cost shall be borne by the Commission of Fisheries and the bond given be void."

"15. Resurveys of planting ground.—When, by any re-survey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commissioner of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground; * * *."

In reaching its conclusion, the defendant Board among other things, recited:

86 "From the evidence, introduced in this case, this Commission is of opinion that the applicant did not show such a case as to entitle him to the relief asked for in his petition. It is admitted that the applicant is on a very considerable portion of the natural rock. It appears that the right to use this ground was purchased by Mr. Hurley from a Company that had purchased this right from the original assignees, and that the stakes at the time Mr. Hurley purchased, were in substantially the same position they now occupy, but it does not appear that the stakes were placed in that position either by Mr. Hart, the former Inspector, or by the County Surveyor, who made the surveys of the various small tracts which now united in one holder, form the subject of this petition. Just how the stakes were moved out upon the public rock, does not appear. The best evidence introduced on this subject, indicates that a former owner moved these stakes out about twenty years ago, and that he not only moved them out, but extended them a long distance to the eastward into a place where they are almost surrounded by the natural rock, the public ground being on the two longest sides, and one of the short sides of this extension. This ground appears to have been taken in this way about five years before Mr. Hurley purchased the rights of the persons or of the corporation occupying the ground. It has never been re-assigned, and is still held by Mr. Hurley under the original assignments."

The Board further certified that the complainant was ignorant of the fact that a portion of the public grounds had been taken in, and was turned over to him.

In passing upon the complainant's request, the defendant Board held, in effect, that before the same could be granted, it was incumbent upon the complainant to show, first, that he was in possession of such natural oyster rock, bed or shoal, without his own default, and secondly, that he must have been placed in possession of the same by the mistake of some officer of the State, whose duty
87 it was to assign planting grounds to him, properly applied for; and the Board thereupon required the complainant to remove the stakes back to the line as prescribed by it, and thus throw open the grounds within the disputed territory to the public. There is no question as to the Complainant having large quantities of oysters and oyster shells planted upon these grounds, variously estimated at from $8,000.00 to $15,000.00 in value, and that the same will be a total loss to him, if the defendant Board's action stands.

The reasons assigned by the Board for its action in thus summarily depriving the complainant of his property, are too flimsy and unreasonable to receive serious consideration. In one breath, it required that he should show his freedom from fault in his occupancy of the natural oyster rocks, and in another it certifies that he was ignorant of the fact that a portion of the public grounds had been taken and turned over to him. The Board further certified, as shown from the foregoing excerpt from their opinion, that the extension of the stakes in question, occurred about twenty years before, and some five years before the complainant purchased the rights of the persons and companies occupying the grounds, and that there had never been any re-assignment, and the complainant still held under the original assignment. The suggestion that it be shown that the possession of the disputed grounds was secured by a mistake on the part of some officer of the State, whose duty it was to make assignment of oyster planting grounds, is even more untenable, when it is certified by the Board that the stakes were improperly extended a quarter of a century ago, without knowledge of the complainant, and five years before he acquired the oyster grounds. The claim is further made, in effect, that the complainant ought to suffer as a result of a wrong committed by his predecessor in title, although he was entirely innocent thereof; and the intimation is also conveyed that the complainant, because of his general knowledge regarding the complaints of persons in the section of the country as to encroachments upon the public grounds or natural oyster rocks,
88 should have in some manner not specified, known of the erroneous location of the ancient title. The defendants apparently forget the position they occupy, when they seek to justify their action by these unreasonable claims. With what degree of propriety, of fairness, of justice and right can they, and the State and its officers, make these contentions? The stakes have remained in their present position for more than a quarter of a century,

marking and indicating the lands in question, and year in and year out during that entire period, acting by and through their accredited representatives, cognizant of the location of the oyster grounds subject to lease, they have yearly rented to, and received from the complainant, the rent specified by law for the premises in question, and he, in good faith, openly and with their full knowledge, has planted oysters and oyster shells upon the lands so staked off and leased to him, and he has been so engaged and employed on quite a large scale, pursuant to the State's policy, and the law respecting the development of its vast and valuable oyster grounds and rights.

To summarily sever this relationship by reason of a change of the boundary lines under the water, upon a re-survey, as prescribed by law, without according to those to be affected thereby, the rights secured to them to remove the oysters found within the territory affected by the change of line or boundary, certainly under circumstances such as exist in this case, would be both unjust and unconscionable. Such action can only be likened to that of a landlord dispossessed of premises he had leased in good faith to a tenant, objecting to the tenant's taking with him his property carried to and placed upon the leased premises. Some possible claim or equity might be set up by the true owner against the removal of property from premises shown to be his; but, surely, those placing a tenant in such an unfortunate position, would not be heard to further add to the embarrassments and losses to which he had been sub-
89 jected, by seizing what he had thereon.

However commendable the course of the defendant Board may be in securing to the general public the right to the free use of the public oyster lands of the State, it should not allow its belated activity in this respect, to make it do injustice to those with whom the State, and its officers, have done business in good faith, and in a perfectly proper manner for so many years. No citizen should expect the State, in order to secure him in any right he may have in its oyster bottoms, to do more than fairly and justly deal with those to whom it has been leasing the same, in furtherance of its policy in respect thereto; and section 15, supra, as regards the very matter under consideration, was intended to afford such protection. To fritter away those rights on one technical pretext or another, would be a travesty upon justice.

Considering the question of the constitutionality of the two provisions of the State oyster law, sections 15 and 39 above quoted, assailed by the complainant, the writer can but believe that the same are invalid, if what has been done in this proceeding, can be successfully accomplished, in that they do not afford due process of law to those who may be deprived of their property thereunder. Due process of law contemplates always adequate notice, a fair hearing, at which shall be accorded and enforced the equal protection of the laws, and that jurisdiction shall have been reposed in the tribunal administering the laws. It is not enough that the parties whose rights are affected, by chance may have had notice, or that the same may have been accorded as a matter of favor. The law itself must require notice, give the right to be heard, and afford an oppor-

tunity to that end, and the test of the constitutionality and validity is not what was done, but, rather, what may have been done under the statute assailed. (Boggs v. Commonwealth, 76 Va., 989, 998, 999 and 1000, an opinion by Judge Staples, and cases cited; The Central Georgia Railroad, 207 U. S., 127; Chicago &c. v.
90 State of Minnesota, 134 U. S. 418; Coe vs. Armour Fertilizer Co. 237 U. S. 413.) The reasonableness of the notice required, the extent to which opportunity is afforded for a hearing, including opportunity for judicial review in proper cases, are vital elements to be taken into account, in construing the validity of the statute. Under section 39 of the oyster law, under review, it is evident that the Commission of Fisheries acts ex parte, and without consulting or affording to any one opportunity to be heard in determining whether they will order a survey or revision of oyster grounds, and the establishment of lines in connection therewith, and they likewise act in making choice of the surveyor or surveyors, to survey and establish such lines. Notice only (of ten days) is required to be given of such survey, to parties whose legal oyster tenures may be directly affected thereby. No opportunity is afforded either to contest the propriety of ordering the re-survey, or of being heard upon the very important question of the selection of the parties to discharge the delicate duty of relaying off the lines; nor is there opportunity afforded to review the action of the surveyor, save in the matter of costs, either by the Board of Fisheries, or any judicial tribunal. Section 15 of the Act, supra, is even more objectionable from a constitutional standpoint. It was apparently intended to provide for the proper disposition of the oysters found upon the grounds where the lines had been re-arranged; but no sort of provision is made for a hearing in respect thereto, the giving of notice, the convening of the Board, or its hearing and decision. Nor is any sort of judicial review of the Board's action provided; yet, it is under that section that the Board has actually concluded to take from the complainant, thousands of dollars of his property, and boldly and bodily turn the same over to the general public, who may be fortunately so circumstanced as to be able to avail themselves of the rich harvest in oysters that will quickly flow from such a grand prize distribution.

91 What was said by Mr. Justice Pitney, speaking for the supreme court, in Ochoa v. Hernandez, 230 U. S., 139, 161, is peculiarly applicable here. "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing"; and the wisdom of that great jurist, Mr.

Justice Bradley, was never more perfectly shown than in his concurring opinion on this subject, in Davidson v. New Orleans, 96 U. S. 97, 107, in which he says: "I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" What could be more arbitrary, oppressive and unjust, than the action of the Board of Fisheries in denying to the complainant the right to remove his oysters from grounds held to be public grounds, placed thereon by him during the period of his lease, and treated by it as ground subject to lease, and for which the complainant regularly and
92 yearly paid full rent therefor. Moreover, it is manifest from the Board's action that it did not seek to justify its course by any claim of right on the facts of the case, but merely upon erroneous conclusions as to what the complainant might, or should have known, or ought to have shown the Board, regarding matters confessedly beyond his control, and wholly out of his power, and which, as a matter of fact, had no material bearing on the controversy. The complainant was admittedly innocent respecting the extension of the lines of the land occupied by him, and he, as tenant from the State, was estopped from contesting the title of his landlord. But not so with the State. At any moment it could have either refused to lease the land, or have properly corrected, or investigated, or re-located the lines before so doing. To accept the lines as those apparently covered by the grant, and lease the same to an innocent holder under the grant, and take his money for doing the very thing the parties to the lease had in view, namely, develop the oyster lands of the State, and suddenly change and frustrate such lines, and keep his property placed upon the lands affected by such change, would be to consummate an actual fraud upon the complainant.

The majority of the court suggest that no hardship has befallen the complaint, since, taking the most favorable view, he had no substantial equity in his claim, inasmuch as the lands upon which he planted his oysters, by reason of the change of lines, had never been actually leased to him. Aside from this extremely technical claim thus advanced, and which it seems to the writer is not supported by the evidence, the same is based upon an erroneous view of the law applicable to the case. In Coe vs. American Fertilizer Works, 237 U. S. 413, 424, Mr. Justice Pitney, speaking for the supreme court, said: "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same

result because he had no adequate defense upon the merits."
93 Citing Rees v. Watertown, 19 Wall, 107, 123.

The further suggestion is made that inasmuch as the complainant asked for his oysters, under section 15 of the act, that he is thereby estopped from raising the question of the constitutionality of the provision. Surely this contention cannot be correct under the facts and circumstances here. This section 15, when read in the light of section 39, shows that when the lines were lawfully changed under that section, certain rights inhered to the oyster planter, to remove his oysters and oyster shells, from the premises to be thrown open to the public by the proposed change; and if it should for a moment be supposed that one was to be penalized by the mere availing himself of the obvious benefits and privileges given by the statute, and could legally secure no rights thereunder, it would be but another evidence of the invalidity and unconstitutionality of this law.

The complainant is, in my judgment, clearly entitled to the injunction prayed for.

Decree Denying Prayer of Bill of Complaint and Refusing Motion for Injunction Pendente Lite.

Entered and Filed February 21st, 1920.

This cause in which a temporary injunction was granted according to the prayer of the complainant's bill on the 27th day of February, 1919, by which the defendants were temporarily enjoined and restrained from removing the stakes and marks designating the oyster planting ground in Rappahannock River, Middlesex County, Virginia, then and now in the possession of J. W. Hurley, complainant, and were further enjoined and restrained from declaring the said ground, or any part thereof, to be public rock, until the said complainant could remove his oysters planted thereon, and from interfering with or molesting the said complainant, J. W.
94 Hurley, from the use and occupation of the said ground until the further order of this court, which temporary injunction was returnable before this court at its court room in the city of Richmond, Virginia, on the 8th day of March, 1919, and was, upon said 8th day of March, 1919, for good cause shown, and by consent of counsel representing the complainant, and all of the defendants, extended and continued to the 2nd day of December, 1919, at which time this cause came on to be heard upon the complainant's bill of complaint, the demurrer and answer of the Commission of Fisheries of Virginia, the affidavits of witnesses taken and filed by the complainant and the defendants, and upon the motion of the complainant, J. W. Hurley by his counsel, that the temporary injunction entered herein on the 27th day of February, 1919, for the reasons set forth in the said bill of complaint be perpetuated, and that the defendants and each of them, be enjoined and restrained from removing the stakes and marks designating the ground in Rappahannock River, Middlesex County, Va., in the possession of J. W. Hurley, and from declaring the said ground, or any part thereof, to be

public rock open to the public, until the said J. W. Hurley was given an opportunity to remove oysters and shells planted by him upon the said public rock within the confines of his stakes and marks, and from interfering with, or molesting the said J. W. Hurley, in the use and occupation of said public rock within the confines of said stakes and marks until the complainant was given an opportunity to remove said shells and oysters from said public rock, and was argued by counsel.

Whereupon the Court took time to consider of its judgment upon said motion, and after having maturely considered the evidence in this case, and the argument of counsel, it is of opinion, for reasons stated in writing and filed with the record in this cause, that the prayer of the complainant's bill should be denied and his
95 motion for a pendente lite injunction refused. It is therefore adjudged, ordered and decreed that the temporary injunction prayed for be, and the same is, hereby refused, but the complainant's bill is not dismissed.

C. A. WOODS,
U. S. Circuit Judge.
EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Richmond, Va., February 21st, 1920.

Petition for Appeal and Order Allowing Same and Fixing Amount of Bond.

Filed March 4th, 1920.

To the Honorable Edmund Waddill, Jr., Judge of the U. S. District Court for the Eastern District of Virginia:

The above-named J. W. Hurley, complainant in the above-entitled cause, feeling himself aggrieved by the order and decree made and entered in this cause by this Honorable Court on the 21st day of February, 1920, whereby said Court denied to complainant the injunctive relief sought, does hereby appeal from said order and decree to the Supreme Court of the United States upon the grounds and for the reasons specified in the assignment of errors which is filed herewith, and prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, under the rules of such Court in such cases made and provided; and your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made
96 Respectfully submitted.

HERBERT I. LEWIS,
THOS. J. DOWNING,
THOS. B. SNEAD,
S. S. P. PATTESON,
For Complainant.

The foregoing petition is granted and the appeal therein prayed for allowed upon giving a bond upon conditions to be approved by the Judge of this Court in the sum of One Thousand dollars.

EDMUND WADDILL, Jr.,
Judge of the United States District Court for the Eastern District of Va.

Richmond, Va., March 4", 1920.

Assignment of Errors.

Filed March 4th, 1920.

To the Honorable Edmund Waddill, Jr., Judge of the United States District Court for the Eastern District of Virginia:

Now comes the complainant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 21st day of February, 1920:

I

For the reason that the learned court erred in holding Chapter 343, Acts General Assembly of Virginia (1910) page 543, particularly sections fifteen and thirty-nine, and Acts 1916, Chapter 461 page 777, especially section six, constitutional and not in violation of the rights of this complainant as being in conflict with the 14th Amendment of the Constitution of the United States upon the ground and for the reasons as in the bill of the
97 complainant set forth, and upon the ground that the said court erred in holding that the said statute under which the said defendants assumed to act was constitutional and not void and of no effect and in not holding that the action of F. Nash Bilisoly, Thomas Henry Nottingham, Horance L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, J. Tyler Crittenden, F. K. Sprinkle and Fred E. Rudeger was null and void and of no effect because the same was had and done without authority of law.

II.

That the learned court erred by said order and decree in holding that the action of the Commission of Fisheries of Virginia in declaring that the complainant, J. W. Hurley, was occupying the public rocks in the Rappahannock River in the County of Middlesex, Virginia, without authority of law, and that on the first day of March, 1919, the stakes designating his oyster grounds should be removed by order of said board and the oysters of the complainant, owned and planted thereon, turned out to the public to be removed from said oyster grounds by any person so desiring and

that the learned court erred in holding that the said act of the said Commission of Fisheries was within the power of said Commission and not in violation of the complainant's rights under the 14th Amendment of the Constitution of the United States notwithstanding the fact that the complainant had no notice, legal or otherwise, for a hearing before said Commission and that no notice is provided for under said statute.

III.

That the learned court erred in holding in said order and decree that the said complainant, J. W. Hurley, was not deprived of his property without due process of law because of the finding in said order and decree that the prayer of the complainant in his bill set forth, to-wit: that the Commission of Fisheries of Virginia, assuming to act in ordering that the stakes designating the oyster
98 grounds claimed by the complainant as a lessor from the State of Virginia should be removed was unconstitutional, void and of no effect, and that the said learned court erred in denying the complainant relief in equity under which conditions the effect and operation of said Acts of General Assembly is such as to make the decision of the Commission conclusive without a hearing, and therefore unconstitutional in that it deprived the complainant of his property without due process of law and without compensation, and denied to him the equal protection of the law.

IV.

Under Sec. 6 Acts of General Assembly of Virginia 1916, page 778, it is provided that the residue of water-fronts * * * and the residue of the beds of bays, rivers, etc., other than natural oyster beds, rocks and shoals, as defined by law, may be occupied for the purpose of planting or propagating oysters thereon by any resident of the State. The grounds leased by the State of Virginia for said purpose are designated by a county surveyor or such surveyor as may be designated by the Commission of Fisheries, and the grounds are marked at the time of the survey and at the direction of the surveyor with suitable stakes and are kept so marked. Under Sec. 15 Acts of General Assembly of Virginia, 1910, page 549, the statute provides for a re-survey of the oyster grounds under the direction of the Commission of Fisheries. The questions of fact involved in any case of re-survey under said oyster laws, where it is claimed that a renter has occupied grounds known as "public rocks" outside the Baylor survey, or (1) when the renter so occupying said grounds is the lessor from the State, or (2) whether the grounds so occupied are staked off as provided by law, or (3) whether the renter has grounds within his stakes known as "public rocks" and if so, whether he has oysters actually planted on the said forbidden grounds, or (4) whether said holder without
99 his own default, and by mistake of any officer of the State has had assigned to him and included in the plat of his as

signment any portion of the natural oyster beds, rocks or shoals as defined by law, after such re-survey as above-mentioned, then the Commission of Fisheries may direct the said stakes to be removed and may allow a reasonable time within which said renter may remove his oysters. The statute does not provide for any notice or any hearing whereby before the Commission of Fisheries shall ascertain and determine that the said stakes shall be removed, the holder or occupier of said grounds, with oysters actually planted thereon, shall have a hearing before said Commission of Fisheries or before any other legal body; no notice or process is provided and there is no means provided whereby such occupier or holder may make defense or have a hearing under said action of said commission. Under the terms and provisions of said statute, the said Commission of Fisheries may confiscate or turn out to the public, the oysters and property of an oyster planter, upon a finding or holding that the grounds upon which the same are planted is a "public rock." The bill sets out that the complainant, J. W. Hurley, had planted upon the disputed grounds, oysters valued at $15,000. The learned court erred in holding that under such circumstances and conditions, the complainant, J. W. Hurley, was not deprived of his property without due process of law and without compensation.

V.

That the learned court erred in holding by said order and decree that said Commission of Fisheries had jurisdiction,—there being no provision in said statute for a hearing on the merits—to direct a re-survey by Fred E. Rudeger, a surveyor of the oyster planting grounds of the complainant to decide upon the report of said surveyor that the complainant was occupying unlawfully "public rocks" in said Rappahannock River and had jurisdiction to direct that the stakes designating said grounds of complainant
100 should be removed and the complainant denied the right to remove his oysters planted thereon from said ground, notwithstanding the fact as it appears from the bill of complaint, the affidavits filed, and not denied by defendants, that the complainant, J. W. Hurley, had oysters planted by him upon said grounds and within the confines of his stakes.

Wherefore complainant prays that said order and decree denying to complainant an interlocutory injunction against the defendants above-named to prevent said Commission of Fisheries, its agents and employees, from removing the stakes designating the said oyster grounds so occupied by complainant, and to prevent said Commission of Fisheries from turning over to the public said oyster grounds and in refusing to permit the said complainant to remove his oysters planted upon said oyster grounds within the confines of said stakes, be reversed and that an injunction be issued against the said defendants above-named restraining and prohibiting said defendants from removing said stakes from said oyster grounds or in any way interfering with the said J. W. Hurley and business conducted by him

as an oyster planter, and that the complainant, J. W. Hurley, have such other relief in the premises as to this court may seem proper.

HERBERT I. LEWIS,
THOS. J. DOWNING,
THOS. B. SNEAD,
S. S. P. PATTESON,
For Complainant.

Appeal Bond.

Executed, Approved and Filed March 6th, 1920.

Know all men by these presents, That we, J. W. Hurley, of Urbanna, Virginia, as Principal, and the Aetna Casualty and Surety Company, as Surety, are held and firmly bound unto the
101 United States of America in the sum of One Thousand Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, the said J. W. Hurley binds himself, his heirs, executors and administrators, and the said Aetna Casualty and Surety Company binds itself, its successors and assigns, firmly by these presents, and the principal hereby waives the benefit of his homestead exemption as to this obligation.

Signed and sealed this 6th day of March, 1920, the said J. W. Hurley, acting by Thomas B. Snead, Attorney-in-Fact, affixing hereto his hand and seal, and the said Aetna Casualty and Surety Company, acting by F. W. Clintsman, who signed hereto the name of the said Company as Attorney-in-Fact, and affixed hereto the corporate seal of the said Company.

Whereas, lately at a district Court of the United States for the Eastern District of Virginia in a suit depending in said Court, between J. W. Hurley, Complainant, and The Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horance L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, Members of the Commission of Fisheries, J. Tyler Crittenden, Inspector, F. K. Sprinkle, Inspector, and Fred E. Rudeger, defendants, a decree was rendered against the said J. W. Hurley, and the said J. W. Hurley having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the day in the said citation mentioned;

Now, the condition of the above obligation is such, that if the said J. W. Hurley shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

J. W. HURLEY, [SEAL.]
By THOMAS B. SNEAD,
Attorney-in-Fact.
THE AETNA CASUALTY & SURETY CO., [SEAL.]
By F. W. CLINTSMAN,
Att'y-in-Fact.

102 Signed and sealed in the presence of:
R. E. POWERS,
Deputy Clerk U. S. District Court.

The foregoing appeal bond is hereby approved.
EDMUND WADDILL, JR.,
United States District Judge.

Power of Attorney to Execute Appeal Bond.

Know all men by these presents, That I, J. W. Hurley of Urbanna, Middlesex County, Virginia, have made, constituted and appointed, and by these presents do make, constitute and appoint, and in my place and stead put and depute Thomas B. Snead, of the City of Richmond, Virginia, my true and lawful attorney for me and in my name, and place and stead to execute an appeal and supersedeas bond in such an amount as the Judge of the United States District Court for the Eastern District of Virginia, may require in order that an appeal may be taken to the United States Supreme Court from the decree entered in the suit of J. W. Hurley v. Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, Members of the Commission of Fisheries, J. Tyler Crittenden, Inspector, F. K. Sprinkle, Inspector, and Fred E. Rudeger, on the 21st day of February, 1920, giving and granting unto my said attorney, by these presents my full and whole power and authority in and about the premises to have, use and take all lawful ways and means, in my name for the purpose aforesaid. And, generally, all and every other act or acts, thing or things in the law whatsoever needful and necessary to be done in and about the premises, for me and in my name, do execute and perform, as fully, largely and ampiy, to all intents and
103 purposes, as I might or could do if personally present. Hereby ratifying, allowing and holding for firm and effectual, all and whatever my said attorney shall lawfully do in and about the premises by virtue hereof.

In witness whereof, I have her-unto set my hand and seal this 2nd day of March, 1920.

J. W. HURLEY. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, To wit:

I, Sophie H. Herrmann, a notary public for the City of Richmond, in the State of Virginia, do certify that J. W. Hurley, whose name is signed to the foregoing power of attorney, has acknowledged the same before me in my city aforesaid.

Given under my hand this 2nd day of March, 1920.

SOPHIE H. HERRMANN,
Notary Public.

My Commission Expires January 21st, 1921.

Citation.

Issued March 8th, 1920.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stand, Members of Commission of Fisheries; J. Tyler Crittenden, Inspector; F. K. Sprinkle, Inspector, and Fred E. Rudeger, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C.,
104 on the 6th April next, pursuant to an appeal from a decree of the District Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said Court wherein J. W. Hurley is complainant, and you are defendants to show cause, if any there be, why the decree rendered against the said J. W. Hurley in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the United States District Court for the Eastern District of Virginia, this 8th day of March, in the year of our Lord one thousand nine hundred and twenty.

EDMUND WADDILL, JR.,
United States District Judge.

Acceptance of Service.

I hereby accept legal service of the within Citation this 11th day of March, 1920.

RO. W. SHULTICE,
Counsel for Defendants.

Stipulation of Counsel as to What Shall Constitute Record on Appeal.

Filed March 11th, 1920.

To the Clerk of the United States District Court for the Eastern District of Virginia:

Upon allowance by the Honorable Judge of the above-entitled Court of the appeal by complainant therein, from the decree and order of said Court, entered in the above-entitled cause, please prepare and transmit to the Clerk of the Supreme Court of the United
States, properly authenticated by you, the following portions
105 of the record to be included in the transcript on such appeal:

1. Bill of Complaint and exhibits;

2. Process and return showing jurisdiction;
3. Affidavits submitted by complainant in support of his bill of complaint;
4. Affidavits submitted by defendants;
5. Opinion and order of the Court and dissenting opinion;
6. Petition for appeal with allowance of Judge;
7. Assignment of errors;
8. Bond;
9. Citation in appeal and proof of service thereof;
10. Certificate of Clerk of United States District Court for the Eastern District of Virginia.
11. Demurrer of defendant, the Commission of Fisheries of Virginia;
12. Answer of said Commission of Fisheries, and exhibits A. B. and C., filed therewith, said exhibits being three plats or maps.

And it is further agreed between counsel that the originals of Exhibits A. B. & C. filed with the defendants' answer, the same being plats or maps, may be certified to the Supreme Court in lieu of such exhibits being copied into the transcript of the record. Also the plats filed with bill of complaint under heading "exhibits" and mentioned in this præcipe at No. 1 "Bill of Complaint and exhibits."

Respectfully,

HERBERT I. LEWIS,
THOMAS J. DOWNING,
THOMAS B. SNEAD,
S. S. P. PATTESON,
For Complainant.
RO. W. SHULTICE,
For Defendant.

106 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record, together with all things thereunto relating, made in accordance with stipulation of counsel as appears herein in the case of J. W. Hurley, Complainant, against The Commission of Fisheries of Virginia, F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, Members of Commission of Fisheries, J. Tyler Crittenden, Inspector,

F. K. Sprinkle, Inspector, and Fred E. Rudeger, Defendants, In Equity No. 45.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Richmond, this 3d day of April, 1920.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States District Court
for the Eastern District of Virginia.

Endorsed on cover: File No. 27,614. E. Virginia D. C. U. S. Term No. 302. J. W. Hurley, appellant, vs. The Commission of Fisheries of Virginia et al. Filed April 10th, 1920. File No. 27,614.

Office Supreme Court, U. S.
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MAY 18 1921
JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 302. 33

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLANT.

HERBERT I. LEWIS,
THOMAS J. DOWNING,
THOMAS B. SNEAD,
S. S. P. PATTESON,
Counsel for Appellant.

(27,614)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 302.

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLANT.

Statement of the Case.

The facts in this case are very carefully stated by District Judge Waddill. He says:

> "The complainant, and those under whom he claims, have for a period of more than twenty years, been engaged in planting and raising oysters in the waters of the Rappahannock River, upon certain small lots of land formerly leased and set aside to them by the State, paying for said land a yearly rental of

$1.00 per acre. The land was regularly surveyed, plotted, and staked off by the State's representatives, and from that time until the beginning of this controversy, some two years ago, the rent was regularly paid each year, and the work of planting and propagating oysters thereon and catching, marketing, and disposing of the same was openly carried on, under the eyes and with the full knowledge of the State's oyster inspectors and others properly having the right of supervision and direction of what was being done.

"The controversy over the right to occupy all lands claimed by the complainant, came about in this way. After he had held and uninterruptedly occupied the same, paying regularly his rentals therefor for many years to the State, a proceeding was inaugurated by ten citizens before the defendant board of fisheries pursuant to provisions of section 39 of the State's general oyster law, approved March 17, 1910, asking a resurvey of the lands of the public oyster grounds within the territory occupied by the complainant, with the result that the board, without perhaps giving either the formal notice to those to be affected, or according them such a full and formal hearing as the law contemplated, found that portions of the ground within complainant's boundary, as staked off, was a part of the natural oyster rock or bed, hence not subject to be leased to or used by the complainant. Upon the board's action being announced, the complainant, pursuant to another provision of the State oyster law, section 15, asked to be allowed a reasonable time within which to remove from the disputed territory his oysters and oyster shells planted thereon, which request the board denied" (Record, p. 57).

The gravamen of this suit is the want of due process, and involves the reasonableness of the notice required under the

State statute. Under section 39 of the oyster law (Record, p. 57) the Commission of Fisheries is authorized and empowered to select and appoint a surveyor to reestablish and permanently mark any line or lines of the Baylor survey which in the judgment of the said board it may be necessary to define, or an application may be made to the Commission of Fisheries by ten citizens of the county to have same reestablished; "but this cannot be done until ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby."

The above language of the statute clearly shows that in the contemplation of the Legislature there may be individual rights of citizens upon the public bottoms of the oyster grounds lying within the Baylor survey, and the case at bar is based upon the fact that there are certain oysters planted by appellant supposed and even admitted to be upon said public bottom, valued by appellant at $15,000.00, and that to that extent he is included among the "parties whose legal oyster tenures might be directly affected thereby." Under the statute law of Virginia, the oyster bottoms in the public waters are divided into two classes. One class is known as the "public oyster rocks" and is designated by and included in what is called the "Baylor survey." The lines designated by the Baylor survey separate the public oyster rocks or bottoms from the rest and residue of the river bottoms, and the last-named are known as "oyster planting grounds," which are subject to be leased by the State to private planters at an annual rental of one dollar per acre.

The said Baylor line is not designated by stakes or other marks by which the same can be ascertained by the public, and it is claimed that Mr. Ruediger, the surveyor for the

Commission of Fisheries, is the only person who can accurately designate the same.

The planting grounds, leased by the State of Virginia, are surveyed and designated by oyster inspectors in the several counties bordering on the rivers and are marked by stakes to designate their respective lines. Appellant has been an oyster planter and lessee of the State for a number of years, and a portion of his planting ground adjoins the Baylor line, and it is claimed by the Commission of Fisheries that he is occupying a part of the public bottoms over and beyond the said Baylor line, and that when the Baylor line was reestablished by the surveyor representing the Commission of Fisheries it appeared that appellant was occupying and had oysters planted upon the public bottoms, contrary to the statute.

No court proceedings were had, nor proceedings of any character, to ascertain whether appellant occupied oyster bottoms outside of the Baylor line, nor are there any proceedings provided by statute whereby provision is made for the hearing of such a proceeding in which due and legal notice is given a citizen occupying the public grounds, whereby he may summon witnesses and be afforded a hearing.

The allegations of the bill, the exhibits filed, the affidavits of witnesses, and all the proceedings show that the Commission of Fisheries directed its surveyor to resurvey the oyster-planting grounds occupied by appellant and upon his report decided that appellant was occupying natural oyster beds within said Baylor survey, and then notified him to remove his stakes, to the end that the public might enter upon the said grounds and remove the oysters planted by appellant (Record, pp. 7, 8, and 9).

Assignment of Errors.

Appellant assigns and relies upon the following errors committed by the lower court in entering its decree of February 21, 1920 (Record, pp. 63 and 64), refusing the injunction prayed for:

I.

For the reason that the learned court erred in holding chapter 343, Acts General Assembly of Virginia (1910), page 543, particularly sections 15 and 39, and Acts 1916, chapter 461, page 777, especially section 6, constitutional and not in violation of the rights of this appellant as being in conflict with the 14th Amendment of the Constitution of the United States upon the ground and for the reasons as in the bill of the appellant set forth, and upon the ground that the said court erred in holding that the said statute under which the said defendants assumed to act was constitutional and not void and of no effect, and in not holding that the action of F. Nash Bilisoly, Thomas Henry Nottingham, Horace L. Smith, J. Hoge Tyler, Jr., Donald T. Stant, J. Tyler Crittenden, F. K. Sprinkle, and Fred E. Rudeger was null and void and of no effect because the same was had and done without authority of law.

II.

That the court erred by said order and decree in holding that the action of the Commission of Fisheries of Virginia in declaring that the appellant, J. W. Hurley, was occupying

the public rocks in the Rappahannock River in the county of Middlesex, Va., without authority of law, and that on the first day of March, 1919, the stakes designating his oyster grounds should be removed by order of said board and the oysters of the appellant, owned and planted thereon, turned out to the public to be removed from said oyster grounds by any person so desiring, and that the learned court erred in holding that the said act of said Commission of Fisheries was within the power of said Commission and not in violation of the appellant's rights under the Fourteenth Amendment of the Constitution of the United States, notwithstanding the fact that the appellant had no notice, legal or otherwise, for a hearing before said Commission, and that no notice is provided for under said statute.

III.

That the learned court erred in holding in said order and decree that the said appellant, J. W. Hurley, was not deprived of his property without due process of law because of the finding in said order and decree that the prayer of the appellant in his bill sets forth, to wit, that the Commission of Fisheries of Virginia, assuming to act in ordering that the stakes designating the oyster grounds claimed by the appellant as a lessee from the State of Virginia should be removed was unconstitutional, void and of no effect; that the said learned court erred in denying the appellant relief in equity under which conditions the effect and operation of said Acts of General Assembly is such as to make the decision of the Commission conclusive without a hearing, and therefore unconstitutional in that it deprived the ap-

pellant of his property without due process of law and without compensation and denied him equal protection of the law.

IV.

Under section 6, Acts of General Assembly of Virginia, 1916, page 778, it is provided that the residue of waterfronts * * * and the residue of the beds of bays, rivers, etc., other than natural oyster beds, rocks, and shoals, as defined by law, may be occupied for the purpose of planting or propagating oysters thereon by any resident of the State. The grounds leased by the State of Virginia for the purpose are designated by a county surveyor or such surveyor as may be designated by the Commission of Fisheries, and the grounds are marked at the time of the survey, and at the direction of the surveyor with suitable stakes and are kept so marked. Under section 15, Acts of General Assembly of Virginia, 1910, page 549, the statute provides for a resurvey of the oyster grounds under the direction of the Commission of Fisheries. The question of fact involved in any case of resurvey under said oyster laws, where it is claimed that a renter has occupied grounds known as "public rocks" outside the Baylor survey is (1) whether the renter so occupying said grounds is the lessee from the State, or (2) whether the grounds so occupied are staked off as provided by law, or (3) whether the renter has grounds within his stakes known as "public rocks," and, if so, whether he has oysters actually planted on said forbidden grounds, or (4) whether said holder without his own default and by mistake of any officer of the State has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds,

rocks, or shoals as defined by law after such resurvey as above mentioned, when the Commission of Fisheries may direct the said stakes to be removed and may allow a reasonable time within which said renter may remove his oysters. The statute does not provide for any notice or any hearing whereby before the Commission of Fisheries shall ascertain and determine that the said stakes shall be removed, the holder or occupier of said grounds, with oysters actually planted thereon, shall have a hearing before said Commission of Fisheries or before any other legal body; no notice or process is provided and there is no means provided whereby such occupier or holder may make defense or have a hearing under said action of said Commission. Under the terms and provisions of said statute, the said Commission of Fisheries may confiscate or turn out to the public the oysters and property of an oyster-planter upon a finding or holding that the grounds upon which the same are planted is a "public rock." The bill sets out that the appellant, J. W. Hurley, has planted upon the disputed ground oysters valued at $15,000. The learned court erred in holding that under such circumstances and conditions the appellant, J. W. Hurley, was not deprived of his property without due process of law and without compensation.

V.

That the learned court erred in holding by said order and decree that said Commission of Fisheries had jurisdiction—there being no provision in said statute for a hearing on the merits—to direct a resurvey by Fred E. Rudeger, a surveyor, of the oyster-planting grounds of the appellant to decide upon the report of the said surveyor that the appellant was

occupying unlawfully "public rocks" in said Rappahannock River and had jurisdiction to direct that the stakes designating said grounds of appellant should be removed and the appellant denied the right to remove his oysters planted thereon from said ground, notwithstanding the fact as it appears from the bill of complaint, the affidavits filed, and not denied by defendants, that the appellant, J. W. Hurley, had oysters planted by him upon said grounds and within the confines of his stakes.

The sections of the State statute above referred to are:

> "§15. *Resurveys of Planting Ground.*—When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster-beds, rocks or shoals, which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from said ground * * *"
>
> Acts 1910, p. 549.

> "§39. *Surveying and Resurveying Planting Grounds and Marking Lines of Geodetic Survey.*—The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms

as may be agreed upon, any surveyor, or surveyors to survey, or resurvey, any oyster-planting grounds, either in his own or any other county, and to re-establish and permanently mark any line or lines of the Baylor geodetic survey, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor geodetic survey re-established and permanently marked, provided a bond and security be given to the Commission of Fisheries that the applicants will pay all costs for surveying and marking; and provided, further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby; and if it should turn out that it was not necessary, in the opinion of the Commission, to have said line or lines re-established, then all costs of the surveying and marking shall be borne by the applicants; but if it appear that the Baylor geodetic survey had been encroached upon, then the costs shall be borne by the Commission of Fisheries and the bond given be void."

Acts 1910, p. 557.

ARGUMENT.

The Law of the Case.

The statute law of Virginia, known as the Oyster Law, contained in chapter 343, Acts 1910, contains only two sections applicable to the case at bar, to wit, section 15 and section 39 (Record, pp. 57 and 58). These two sections provide for the resurveying of planting grounds, and it will be noticed that in neither section, nor in any other portion of

the oyster laws of Virginia, is there any provision made for a trial of the rights of an oyster planter who is lessee of the State and whose oyster beds adjoin the Baylor line.

The case at bar, as set forth in the bill, is based upon the want of due process in the proceedings which have been taken by the Commission of Fisheries.

It is submitted that no hearing is provided for by the statute, and none seems to have been contemplated. Section 15 provides that

> "When, by any resurvey of oyster-planting grounds, or survey made to re-establish the lines of the State, survey of natural oyster beds, rocks or shoals which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from the said ground, or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion and duly advertised within which to remove his planted oysters or shells from the said ground."

It will be observed that while the statute provides for the ascertainment of a fact and uses the term "if it shall appear, etc.," there is no provision for a hearing and no provision for a notice to the occupant of such grounds or to the owner of such planted oysters.

It is therefore submitted that under the Constitution the Commission of Fisheries did not have jurisdiction to hear and determine the property rights of appellant, without some provision of law whereby he was to be given a hearing, and without notice of the same being provided for in the statute. As set out in the statement of facts and in the pleadings in the cause, appellant had built up and improved the oyster-planting grounds by actually planting oysters thereon; whether by his own negligence in not having all the necessary plats of his ground and all assignments to him duly recorded, yet he had been allowed by the State's officers to stake up these grounds, pay taxes for rental thereof, was thereby an actual lessee of the State, and did have oysters actually planted thereon by authority thus conferred and by permission of the oyster inspectors, and had at the time of the proceedings instituted by the Commission of Fisheries property in the shape of planted oysters upon the said grounds, held and decided by the Commission of Fisheries to be public bottoms within the Baylor survey, of the value of more than $8,000.00.

By the action of the Commission of Fisheries, it has been determined that the stakes designating the oyster grounds of appellant shall be at once removed and that his property, to wit, said planted oysters, shall be thrown open to the public, and that he, the owner thereof, shall not be permitted to take posession of or to remove the same, thus confiscating, without any legal proceedings, the property of appellant.

Adequate notice and a hearing is absolutely necessary in order to provide due process of law. The legislative power cannot, directly or indirectly, reach the property or vested rights of the citizen without a trial and judgment by a court

of competent jurisdiction. Where no hearing is provided for, no summons or notice to appellant before the Commission has found what it is to find and declare what it is to declare, and no opportunity provided for appellant to introduce witnesses before the Commission, there is not the semblance of due process of law. Chicago, M. & St. P. Rwy. Co. *vs.* State of Minn., 134 U. S., 418.

The fundamental requisites of due process are, first, adequate notice; second, a hearing; third, the application of equal law; fourth, jurisdiction. In all cases, reasonableness of the notice required under a State statute involves the vital element of due process. Under section 39 of the oyster law, the Commission of Fisheries is authorized and empowered to select and appoint a surveyor to re-establish and permanently mark, etc., and contains this provision: "* * * *And provided further*, That ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby * * *." Since appellant is a lessee of the State, he comes within the purview and meaning of the language: "whose legal oyster tenures might be directly affected thereby," but the statute does not provide by whom the notice shall be given, nor does it provide for any action to be taken before any legal tribunal, whereby such persons so affected might be afforded a hearing. It is claimed that no such notice was ever given, but even had it been given the law relative to due process would not have been thereby affected.

It is further submitted that, under the terms of the oyster law, no provision is made for a hearing before said board upon the coming in of the report of a surveyor so appointed to make such resurvey, nor is there any provision for the

summoning of witnesses, nor is there any provision for a hearing before any competent court. This failure of the statute so to provide is a denial of due process of law as provided by the Constitution of the United States, is a taking of private property without such due process of law, and is therefore unconstitutional.

Until appellant received notice from the Commission of Fisheries stating that they had considered his property rights and decided that he had none in said planted oysters, no legal steps had been taken in the premises. In the language of Mr. Justice Pitney, in the case of Ochoa *vs.* Hernandez, 230 U. S., 139, 161, "without the guarantee of due process, the right of private property cannot be said to exist in the sense in which it is known to our laws. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The many definitions of "due process of law" contain the distinct rule that the court, by whatever name it may be called, must hear before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

Mr. Justice Bradley, in Davidson *vs.* New Orleans, 96 U. S., 97, 107, says: "In judging what is due process of law, respect must be had to the cause and object of taking * * * but if found to be arbitrary, oppressive, and unjust it may be declared to be not due process of law." No judgment of a court is due process of law if rendered without jurisdiction or without notice to the party.

It is contended by appellees that appellant appeared before

the board, to wit, the Commission of Fisheries, had his witnesses examined, and thereby was given a hearing. Appellant had the right, and did not thereby waive any of his privileges, to come into this court by appearing before said board and asking that he might have the privilege and be given a reasonable time within which to remove his oysters, and such action neither aids appellees nor estops appellant. "It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice and give them the right to a hearing, and an opportunity to be heard. * * * The constitutional validity is to be tested, not by what was done under writ, but by what may by its authority be done."

Stuart *vs.* Palmer, 74 N. Y., 183.

Taylor on Due Process, section 133.

Coe *vs.* Armour Fertilizer Works, 237 U. S., 413, 424.

> "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."
>
> Central of Georgia R. R., 207 U. S., 127.

Therefore it is submitted that when we are met by the defense on the part of appellees that a hearing has been afforded, if such was a fact, such hearing was afforded as a matter of grace, and this is not sufficient.

Mr. Justice Pitney says, in the case of Ochoa *vs.* Hernandes, 230 U. S., 139: "Without the guaranty of due process, the right of private property cannot be said to exist in the sense in which it is known to our laws. The principle known to the common law, before Magna Charta, was embodied in that charter, and has been recognized since the

revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing" (Record, foot p. 61). See also Taylor on Due Process of Law, section 245. The many definitions of "due process of law" contain the distinct rule that the court, by whatever name it may be called, must hear before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

There is a distinction drawn where the taking is by the sovereignty of the State, through the power of taxation or eminent domain, where the process does not require the same kind of tribunal, but, even in all such cases, provision is made for a hearing by the parties to be affected.

Mr. Justice Bradley, in Davidson *vs.* New Orleans, 96 U. S., 97, says: "In judging what is due process of law, respect must be had to the cause and object of taking * * * but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."

No judgment of a court is due process of law if rendered without jurisdiction or without notice to the parties.

Text-writers link together "notice and hearing" as one phrase for the reason, no doubt, that the two distinct rights are so interlaced that it is practically impossible to consider the one without reference to the other.

> "To one who protests against the taking of his property 'without due process of law,' it is no answer to say that, in his particular case, due process of law would have led to the same result, because he had no adequate defense upon the merits."
>
> Coe *vs.* Armour Fert. Works, 237 U. S., 413.

"This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

Central Geo. R. R. *vs.* Wright, 207 U. S., 127.
Taylor on Due Process of Law, p. 296.

The facts here show that appellant has been a lessee of the State for a number of years, of oyster ground in the Rappahannock River, and has annually paid to the State rent for the same, and has actually planted oysters upon said grounds. (Record p. 27.) It is claimed by the Board of Fisheries that appellant has taken possession of, and has staked in, a portion of the public bottoms lying within the Baylor survey and adjoining what the said board admits to be planting ground occupied by him.

The Board of Fisheries has forbidden appellant to remove any of said oysters from the said grounds, lying within the Baylor survey, and intends to open said grounds to the public, thereby taking from appellant his property, to-wit: the said planted oysters. The injunction in this case was granted to restrain the said board in their said action.

The courts have authority to enjoin the officers of the State, where they are acting under the color of an unconstitutional statute whereby they commit acts of wrong and injury to the rights and property of appellants, acquired under contract with the State. These suits may be brought in a proper case where the remedy at law is inadequate for an injunction to prevent such wrong and injury. Where suits of this character are brought in the United States Court, they are not within the meaning of the Eleventh amendment, an action against the State.

Regan *vs.* Farmers Loan & Trust Co., 154 U. S., 389.
Fitz *vs.* McGee, 172 U. S., 516.

In the case of Stuart, Governor *vs.* Smith-Courtney Co., 123 Va., 231, the court says: "It is agreed that the board (State Lime Grinding Board) was created by the State for governmental purposes, and that, therefore, this proceeding is in effect a suit against the State, which cannot be maintained without the consent of the State." So in the instant case the Commission of Fisheries is a board created by the State for governmental purposes. Now, for the purposes of this case, it is submitted on the strength of the foregoing authorities, that the statute law of Virginia, authorizing the Commission of Fisheries to proceed as hereinbefore stated, and thereby deprive appellant of his property without due process of law, is unconstitutional, and that the acts and orders of the said Commission of Fisheries are void.

Furthermore, appellant has the right to attack this law on the ground that it is unconstitutional, because he has a pecuniary interest in the question, in that the enforcement of the law would be an infringement upon his rights.

6 R. C. L., section 87.

Boggs *vs.* Commonwealth, 76 Va., 989.

In *Ex parte* Young, 209 U. S., pages 123, 156, it is said:

> "Individuals who as officers of the State are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional State statute, may be enjoined from so doing by a Federal court. It is not necessary that the duties of a State officer to enforce a statute be declared in that statute itself in order to permit his being enjoined as a party defendant from enforcing it; if by virtue of his office he has some con-

> nection with the enforcement of the act, whether it arise by common, general law, or by statute."

No more flagrant violation of the Constitution of the United States, whose powers are now invoked, could be conceived of than that set forth above in the instant case. 14th Amendment, section 1 (Record, p. 11).

The language of the letter from the Commission of Fisheries of Virginia, dated December 20, 1918, written to Col. T. J. Downing, clearly shows that such was the understanding of the law, when they state in said letter:

> "The Commission decided they had no authority under the law to give Mr. Hurley time in this case, since the testimony of the engineer precluded in the minds of the Commission, the reconciling of the plats recorded in the clerk's office of Middlesex, showing the original assignments, with the ground now held by Hurley" (Record, p. 6).

From this letter it appears that the Commission of Fisheries has arbitrarily, without notice or hearing, in fact, and without same being provided by statute, examined into and investigated the question as to whether the ground now occupied by appellant as oyster-planting ground is the same ground as that described in the original assignments held by him, and they have also decided to "open the ground to the public" and have even refused to give any time for appellant to remove his oysters planted by him as aforesaid from the said grounds.

Judge Waddill, who wrote the dissenting opinion, says:

> "Considering the question of the constitutionality of the two provisions of the State oyster law, section

15 and section 39 above quoted, assailed by the complainant, the writer can but believe that the same are invalid, if what has been done in this proceeding, can be successfully accomplished, in that they do not afford due process of law to those who may be deprived of their property thereunder. Due process of law contemplates always adequate notice, a fair hearing, at which shall be accorded and enforced the equal protection of the laws, and that jurisdiction shall have been reposed in the tribunal administering the laws. It is not enough that the parties whose rights are affected by chance may have had notice, or that the same may have been accorded as a matter of favor. The law itself must require notice, give the right to be heard, and afford an opportunity to that end, and the test of the constitutionality and validity is not what was done, but rather, what may have been done under the statute assailed. (Boggs *vs.* Commonwealth, 76 Va., 989, 998, 999, and 1000, an opinion by Judge Staples, and cases cited; The Central Georgia Railroad, 207 U. S., 127; Chicago, &c., *vs.* State of Minnesota, 134 U. S., 418; Coe *vs.* Armour Fertilizer Co., 237 U. S., 413. The reasonableness of the notice required, the extent to which opportunity is afforded for a hearing, including opportunity for judicial review in proper cases, are vital elements to be taken into account, in construing the validity of the statute. Under section 39 of the oyster law, under review, it is evident that the Commission of Fisheries acts *ex parte*, and without consulting or affording to anyone opportunity to be heard in determining whether they will order a survey or revision of the oyster grounds, and the establishment of lines in connection therewith, and they likewise act in making choice of the surveyor or surveyors, to survey and establish such lines" (Record, pp. 60-61).

CONCLUSION.

The Commission of Fisheries, having determined and ordered that the stakes designating the oyster grounds of appellant be removed, and that the planted oysters and shells, the property of appellant should be thrown open to the public, are seeking to confiscate and take from appellant as a forfeiture, his property, and unless the said Commission of Fisheries, the members of the said board composing the Commission, and all others acting under their authority are restrained by the injunction prayed for in the bill of complaint in this suit, the property of appellant will be thus taken to his great injury and damage.

Upon the facts set forth in appellant's bill, the exhibits filed therewith, and the affidavits of witnesses, it is respectfully submitted that the lower court should have held:

First. That the Commission of Fisheries had no jurisdiction to decide and determine that appellant was not in the legal possession of oyster planting ground, and was not entitled to remove his property thereon, to-wit: his planted oysters and shells.

Second. That, the Constitution of the United States requiring in effect, that there should be a hearing after due notice to appellant by a court of competent jurisdiction, without which there is no due process of law, therefore appellees have violated this principle by seeking to destroy the property rights of appellant.

Third. That the oyster law, failing to provide for legal notice and a hearing, whereby the rights of appellant might have been ascertained appellees have proceeded without due process of law, and should therefore be enjoined.

It is respectfully submitted that the facts set forth in the majority opinion (Record, pp. 52-56), as the basis of the court's conclusion are not a full, fair and correct statement thereof.

Appellant earnestly insists that he is entitled to the injunction prayed for and that if it is not granted so that his rights may be established, after a hearing as provided for by law, he will suffer great pecuniary loss and injury for which he will have no remedy whatsoever.

Respectfully submitted,

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MAY 11, 1921.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. [redacted]88

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLEES

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ROBERT W. SHULTICE,
Counsel for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 302.

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLEES

Statement of the Case

From the time when the transportation facilities of this country enabled fresh oysters to be marketed in the centers of population, there has been a contest in the State of Virginia between two large classes of people engaged in the oyster industry. One class known as Planters, whose business it is to buy small oysters and distribute them upon selected areas under the public waters of the state, where they grow to

marketable size. The other class are known as Tongers, and it has always been the business of these people to go out on the unoccupied bottoms and catch oysters from the public grounds, some of which are disposed of to market boats and some to the planters. These two classes came into existence on account of the natural condition of the grounds under the tidal waters in Virginia, some of which grounds have always grown oysters naturally, and some have not.

From the earliest times almost, the law makers of the state have recognized this condition under the salt waters of the state, and have protected the tonging class by statute law, and by constitutional provisions. By section 175 of the Code of Virginia, it is provided: "The natural oyster beds, rocks and shoals in the waters of this state, shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this state, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may from time to time define and determine such natural oyster beds, rocks or shoals by surveys, or otherwise".

At first the oyster bottoms desired for planting purposes were not rented by the state to individuals, but were taken up, staked off and occupied by citizens desiring to go into the planting business, and so long as this business was, in a certain sense, not extensive, the custom was free from objection, but as the planting grounds became more in demand, the state, about the year 1871, passed a law requiring these grounds to be rented from the state at a nominal rental of twenty-

five cents per acre per year. This law was passed more for the purpose of preventing disputes than for the trifling revenue derived. The term given the renter was very short, and was subject to change by the General Assembly.

Between 1871 and 1892 disputes became frequent between the two great classes of people engaged in the oyster industry in the state of Virginia. The tongers complained that the planters were encroaching more and more upon the public rocks, and the Legislature of Virginia, for the purpose of putting these troubles forever at rest, in 1892 and 1894 passed acts of vital importance to the oyster business, by which planters were permitted to obtain assignments of grounds suitable for planting, for a period of twenty years, and all natural oyster rocks, beds and shoals were to be surveyed, platted and marked so that they could be kept forever for the use of that large body of citizens engaged in catching oysters on them in their small boats from day to day throughout the oyster season. It was intended that these public rocks should be forever held in trust for the benefit of that class of people.

In pursuance of this law, the Federal Government loaned the State of Virginia a vessel and the services of Mr. Baylor, a thoroughly competent and efficient gentleman, who laid off all of the public grounds in the state, made plats of them, and these plats were filed in the various clerk's offices of the tidewater counties, the grounds so surveyed were marked, not only with stakes stuck in the land under the water, but by permanent marks on the shores. In pursuance

of the law, the county courts of each county appointed citizens of the several counties, familiar with the oyster grounds in their respective counties, to go out with Mr. Baylor and his assistant engineers and show them what were suitable for planting purposes, and what were natural oyster rocks, beds or shoals.

The entire statute was well considered and is one of the wisest pieces of legislation ever enacted in the State of Virginia. It was the outgrowth of bickerings that had filled the courts of Tidewater for twenty years, and was designed to protect the rights of both classes of citizens engaged in the oyster industry.

Among other provisions of the statute, is the following: "Said survey and report, when so filed, shall be, and construed to be, in all the courts of this Commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filled; provided that if any natural oyster bed, rock or shoal is left out of these surveys, they shall not be used for planting grounds, but shall be subject to the general oyster laws of the state". The latter part of this provision was later eliminated; so that all grounds within the Baylor Survey are conclusively natural rock, and all without are open to renters for the planting and propagation of oysters.

Very shortly after the completion of the "Baylor Survey" in 1894, a number of small parcels of oyster ground in Middlesex County, both East and West of

the mouth of Urbanna Creek, were taken up by citizens of that county, and proper assignments were made to them by the then Oyster Inspector of that district. These oyster planting grounds sometime afterwards came by various assignments into the possession of and became the property of the appellant, J. W. Hurley. The evidence conclusively shows that before these various parcels of ground became the property of the appellant, the stakes had been moved out into the river and stuck upon and into the natural rocks lying adjacent to said grounds. The affidavit of A. S. Segar (page 40 of record) shows the very day on which a portion of this natural rock was taken up by a man named Wagner, then the owner of a portion of the ground now in the possession of the appellant. (See also the affidavits of O. J. Palmer, pages 41 and 42, and John Webb, pages 43 and 44).

It is true that these parcels of natural oyster rock were in the possession, though wrongfully, of citizens of the state before Mr. Hurley acquired them, but it is also clearly shown by the evidence that such possession was a matter of common knowledge and general complaint in the neighborhood. It is also shown that the appellant took over these grounds without having a survey made, or without having the records in the clerk's office of Middlesex County examined to ascertain the title to the ground and the extent thereof, although the Baylor Survey for Middlesex County was recorded in said clerk's office, and certainly showed the marks on the shore by which the lines could easily have been established.

It is, of course, true that the original stakes had long since been eaten away by the salt water worms, but numerous affidavits show that parts of the stakes underneath the water were still visible, and that the remains of an old watch house were clearly to be seen.

The appellant remained in possession of this public oyster rock for at least fifteen years, during which time he paid rent only on the ground properly assigned, which consisted of 47.48 acres, although he had in his possession 91.05 acres, part of which had never been surveyed or assigned to him, and to which he could acquire no title whatsoever.

Some time in the Summer or Fall of 1918, complaint was made to the Commission of Fisheries of Virginia by ten citizens of the county of Middlesex, supported by a proper bond as required by the statute providing for such a complaint. In November, 1918, the Commission of Fisheries sent Mr. F. E. Ruediger, its engineer, to Urbanna and directed him to report to Mr. J. W. Hurley, the Appellant. He did so, told Mr. Hurley what his mission was, and Mr. Hurley sent a man in a boat with him to show the lines of the ground occupied and claimed by the appellant. In accordance with the lines so shown the engineer, a survey was made. Mr. Hurley upon seeing the plat said that the outshore part of the ground was his, but that he had made application for the inshore part. Upon a careful investigation of the records, however, the engineer ascertained that the inshore part was the part that had been assigned to the appellant's assignors, and that no part of the outshore territory, that

is, that portion of it lying within the Baylor Survey, had ever been assigned either to the appellant or to any under whom he claimed.

After these facts had been clearly ascertained, the appellant made application to be heard by the Commission of Fisheries of Virginia, that time might be given him within which to remove the oysters and shells planted by him upon the 30½ acres of natural rock found by the engineer to be in his possession. On the 16th of December, 1918, this application was heard at Norfolk, Va., by the Commission of Fisheries, and on the 20th of the same month it was refused. Application was then made for a re-hearing, and the Commission of Fisheries went to Urbanna, Middlesex County about the middle of February, 1919, that all witnesses for the appellant might be heard in person, and that appellant might have full opportunity of presenting any facts that would entitle him to a period within which to remove his oysters and shells from the 30½ acres of natural rock in his possession. At this trial the appellant was represented by Counsel, and after a full hearing and argument of the case the Commission of Fisheries on the 18th of February, 1919, refused the petition of the appellant, and ordered the natural rock to be turned out for the use of that class of citizens who, under section 175 of the Code of Virginia, had been deprived of its use for more than fifteen years. Shortly after this decision was mailed to the appellant, this suit was instituted.

ASSIGNMENTS OF ERROR.

Five grounds of error are assigned by the appellant, but upon examining them, they will be found to involve only one question—whether the order of the Commission of Fisheries of February 18th, 1919, in denying the petition of the appellant and ordering the 30½ acres of natural rock in his possession to be turned out to the public as a part of the Baylor Survey, was such a taking of property without due process of law, as falls within the inhibition of the 14th amendment of the Constitution of the United States.

ARGUMENT.

By section 39 of the Acts of Assembly, 1916, now section 3257 of the Code of Virginia, 1919, it is provided as follows:

"Sec. 3257. *Surveying and Resurveying Planting Grounds; and Marking Lines of Survey of Natural Oyster Rocks*—The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms as may be agreed upon, any surveyor, or surveyors, to survey, or resurvey, any oyster-planting grounds, either in his own or any other county and to re-establish and permanently mark any line or lines of the Baylor Survey, of natural oyster rocks, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor survey re-established and permanently marked, provided a bond and security be given to the Commission of

Fisheries that the applicants will pay all costs for surveying and marking; and provided further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby, and if it should turn out that is was not necessary, in the opinion of the commission, to have said line or lines re-established, then all costs of the survey and marking shall be borne by the applicants; but if it shall appear that the Baylor survey had been encroached upon, then the cost shall be borne by the Commission of Fisheries and the bond given be void. (1910 p. 543, §39)."

This is the statute under which the Commission of Fisheries proceeded to have the ground involved in this suit, surveyed for the purpose of ascertaining whether it was natural oyster rock or not, and the only deviation from the statute was that ten days' notice was not given to the appellant before the Commission's engineer went upon the ground, which seems to be contemplated by the statute, where a renter's *legal tenure* is to be affected, but it is submitted in the instant case that the legal tenure of the appellant was not in any way affected by this survey, and no effort was made, except to dispossess him of the illegal possession he had enjoyed for more than fifteen years. After the order of February 18th, 1919, had been entered, his legal tenure was just what it had always been, and no effort was made at any time to interfere with any legal rights enjoyed by the appellant.

We submit further that any notice the appellant may have been entitled to was waived by him, because

before the survey was begun, Mr. Reudiger waited upon him, told him what his business in Middlesex County was, and Mr. Hurley sent him upon the ground in the care of one of his employees that he might be shown the true positions of the lines claimed by the appellant. There is nothing of importance in the ten days' notice, even if Mr. Hurley's legal tenure had been at stake. The appellant had due notice of the surveyor's business and assisted him in making the survey. After the survey was made, the plat was shown him, he made suggestions in regard to it, and the plats recorded in the clerk's office under which the appellant claimed, were checked with the plat made by Mr. Reudiger, and then, after the appellant could no longer deny the illegality of his position, he made application to the Commission of Fisheries for time within which to remove his oysters from the 30½ acres of ground, which by the very petition itself, he admitted to be illegally in his possession.

The statute under which he proceeded is section 15, of the Acts of 1916, Section 3233 of the Code of Virginia, 1919, and is as follows:

"Sec. 3233. *Resurveys of Planting Grounds.*—When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals, which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oys-

ter beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground, and any person other than the said holder, his agents or employees, going upon the said ground and taking oysters or shells therefrom before the expiration of the time allowed said holder, shall be deemed guilty of larceny thereof and shall be punished as provided by this chapter for the larceny of oysters. (Id., §15)."

Had the appellant objected to the notice given him, he should have proceeded in a different way, but he admitted the legality of the notice, and the correctness of the survey, and early in December, 1918, he came before the Commission of Fisheries with his petition, asking to be allowed further time within which to remove the oysters and shells alleged by him to have been planted upon the 30½ acres of natural rock which he held. There were two hearings, the second one at the place where the ground involved in this suit is located. This was done to enable the appellant to produce all necessary witnesses, records and papers before the Commission, and after a long and full hearing upon this petition, the Commission promulgated the order of February 18th, 1919. This order directing the stakes to be removed from the natural rock and ordering this 30½ acres of ground not

rented by the appallent, to be turned out to the citizens of the state, is the order complained of, and it is alleged that this is a taking of the appellant's property without due process of law and the taking of private property without compensation contrary to the Constitution of the United States.

It will be observed that the section of the law relied upon by the appellant gives discretionary powers to the Commission of Fisheries only in certain specified cases. It provides that where a holder of ground "without his own default, and by mistake of any officer of the state, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals, as defined by law, and it shall further appear that such holder has oysters and shells planted on the said ground, then before the stakes shall be removed from said ground, or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, etc."

The Commission, as shown by its order, construed this statute as giving it no authority to extend the time of one to take oysters from the public rocks, unless the ground had been assigned to him, was included in his plat and that this had been done without default upon his part and by mistake of an officer of the state of Virginia. Not only do not all of these occur in the case under discussion, but none of them were shown to have occurred. The appellant had taken the ground without having a survey made, or the title examined. No assignment of this 30½

acres had ever been made to him, or to those under whom he claimed, and he was found to be in possession of all the ground to which he was entitled under his assignments, with this ground excluded from his boundaries. Not only was this clearly shown, but an examination of the plats demonstrated the fact that the assignments conformed on their offshore lines to the lines of the Baylor Survey, and that the stakes had been carried out and extended parallel with the Baylor Survey line, so as to show a set purpose on the part of some one to so copy the general direction of that line as to deceive the eye of any one examining that ground, and create the belief that the outshore line of the occupied ground was the inshore line of the Baylor Survey.

The object of this Statute was to protect those who were honestly mistaken in their rights, and who had been misled by the carelessness or inefficiency of any state officer, and had expended their funds in planting oysters through such mistakes upon the public bottoms, and the only discretion given the Commission of Fisheries is to prescribe the time such persons may have for removing their property from that portion of the public domain so honestly and mistakenly occupied by them.

The court below has said in its opinion:

"The statute does not take away any property or injure any property right; on the contrary it confers rights on the conditions set out. When the state creates and confers rights not before in existence it may

attach to them any conditions, and those who claim the benefits of the statute must accept its conditions.

Cooley's Constitutional Limitations, 181. Since the bill, affidavits and exhibits show that the complainant has no property right, either at common law or under the statute, to be taken without compensation or without due process of law, he is not injured by any of the statutes relating to the matter, and will not be heard to assert their invalidity. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S., 151; Louisville & Nashville R. R. Co., v. Finn 235 U. S. 601; Jeffrey Mfg. Co., v. Blagg, 235 U. S., 571; Hendrick v. State of Maryland, 235 U. S., 610; Mallinckrodt Works v. St. Louis, 238 U. S., 41; "and at page 54 of the record, the court has also said:

"The complainant cannot be heard to allege the unconstitutionality of a statute he has himself invoked and relied on. Williams v. Eggleston, 170 U. S., 304; Chicago &c., Railroad v. Nebraska, 170 U. S., 57; Kansas City, &c., R. R. Co., v. Stiles, 242 U. S., 111; Kryger v. Wilson, 242 U. S., 171."

A case similar to the one under discussion, and cited with approval by the court below in this case, is that of Commission v. Hampton Roads Oyster Company, 109 Va., 565. In that case, the oyster inspector representing the state, had improperly assigned certain ground to the Hampton Roads Oyster Company. After a survey was made, this company on account of the ground having been assigned to it by an officer of the state, was given a period of time within which to remove these oysters. This period was extended

at the request of the occupant, and later a further request was denied. An injunction was obtained, and the same reasons were alleged as in the case under discussion. At page 578 the Supreme Court of Appeals of Virginia says:

"The wisdom of the legislature in giving to a survey and report of the oyster-beds, rocks and shoals in the waters of the Commonwealth, the probative force and effect that it did, is demonstrated by the wide range this litigation and the evidence relied on in support of appellee's contentions have taken. There would be no end to litigation concerning the limits of the Baylor survey, if the appellant, the Commission of Fisheries, could be called on to litigate in the courts the correctness of every survey re-establishing a line or lines of the Baylor survey, and that question to be determined upon a mere preponderance of the evidence that might be adduced. It was plainly the purpose of the legislature to put an end to such litigation by establishing a final arbiter of all questions as to the location of a line or lines of the Baylor survey, and to relieve the officers of the State in charge of the oyster industry from litigation in the courts concerning the same."

And further at page 582, the same court says:

"The view that the Baylor survey, and the Edmonds-Baker survey re-establishing the lines of public ground No. 1, in Nineteenth district, Nansemond county, as surveyed and located by the Baylor survey and report, are conclusive and could not be challenged

by subsequent proceedings in court, is sustained by the Supreme Court of the United States in Gardner v. Bonestell, 180 U. S., 362, 45 L. Ed. 574; 21 Sup. Ct., 399, where it was held: "It is a well settled rule of law that power to make and correct surveys of public lands belongs exclusively to the political department of the government, and that the action of that department within the scope of its authority, is unassailable in the courts, except by a direct proceeding. The determination by the land department in a case within its jurisdiction of questions of fact depending on conflicting testimony is conclusive, and cannot be challenged by a subsequent proceeding in the courts".

And in a still later case, Bates & Guild Co., v. Payne, 194 U. S., 106, 48 L. Ed. 894, 24 Sup. Ct., 595, the same court held that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they have the power and will occasionally exercise the right of so doing. In the course of the opinion it is said: "It has long been the settled practice of this court in land cases to treat the findings of the land department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in Burfenning v. Chicago, St. Paul, &c., R. R., 163 U. S., 321; 41 L. Ed. 175, 16 Sup. Ct.. 1018:

"Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, depending on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions, is conclusive and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." Citing with approval Gardner v. Bonestell, supra.

The court below, after having commented upon the case of Commission v. Hampton Roads Oyster Company, 109 Va., 565, and approving the conclusions in that case, that the Baylor survey was made by the statute conclusive evidence of the area of the natural oyster grounds of the state, and that the statutory enactment to that effect was constitutional, proceeds to discuss those principles and apply them to the instant case. The language of the opinion is as follows:

"The correctness of these conclusions is made so clear both on principle and authority by the reasoning of the court and the authorities cited, that further discussion would be superfluous. The complainant having under the common law no legal interest in the land or the oysters could not allege the statute under which the Commission of Fisheries ordered the natural oyster land opened to the public to be unconstitutional, on the ground that it did not provide that he should have notice and a hearing. Having by the common law no property in the oysters planted, complainant had nothing to be compensated for, or to be protected

by due process of law, unless he can show a property right conferred by the statute law of Virginia."

The court below concludes its opinion denying the injunction and revoking the temporary restraining order as follows:

"Fortunately this conclusion works no hardship on the complainant. Taking the most favorable possible view of his case he has no substantial equity. The land from which he has unlawfully excluded the public has never been assigned to him or his predecessors and no rent has been paid for it. The total area claimed by him and in his possession as ascertained by Reudiger's survey is 91.05 acres. The bill alleges he has been paying rent on 47.48 acres in two tracts, 21.98 acres and 25.5 acres. This taken from the 91.05 in his possession leaves more than the 36.50 acres of natural oyster ground in his possession for which he has paid no rent.

"Nor will there be any unjust advantage to the state or the public in opening this natural oyster ground to the public. True complainant planted the oysters and will be deprived of the exclusive right to gather them; but it is also true that he has for fifteen years appropriated to his own use all the natural oysters on the land which were the property of all the people of the state." Which is not only a brief and accurate resume' of the facts and correct determination of the principles of law involved in this litigation, but a

most happy way of showing that loss has been entailed upon no party to the litigation in the working out of complete justice to all.

Respectfully submitted,

J. D. HANK,
Assistant Attorney General of Virginia.

ROBERT W. SHULTICE,
Counsel for Appellees.

HURLEY *v.* COMMISSION OF FISHERIES OF VIRGINIA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 33. Argued October 10, 11, 1921.—Decided December 5, 1921.

Decree of the District Court refusing a preliminary injunction, but not dismissing the bill, in a suit to enjoin the appellees from removing stakes, etc., designating oyster grounds planted by appellant, and thereby opening them to public use,—affirmed.
264 Fed. 116, affirmed.

For a fuller statement of the case see the report of the case below.

Mr. Thomas B. Snead and *Mr. S. S. P. Patteson*, with whom *Mr. Herbert I. Lewis* and *Mr. Thomas J. Downing* were on the brief, for appellant.

Their principal contentions may be summarized as follows:

The statute of Virginia, known as the Oyster Law, (Acts 1910, c. 343) contains only two sections applicable to the case at bar, to wit, §§ 15 and 39. These provide for the resurveying of planting grounds, and in neither, nor in any other portion of the oyster laws, is any provision for a trial of the rights of an oyster planter, lessee of the State, whose beds adjoin the Baylor line, demarking the natural oyster grounds reserved to the public.

While the statute [1] provides for the ascertainment of a fact and uses the words "it shall appear," etc., there is no provision even for a notice to the occupant.

It is therefore submitted that under the Constitution the Commission of Fisheries did not have jurisdiction to determine the property rights of appellant. Appellant had built up and improved the grounds by planting; had been allowed by the State's officers to stake them and pay taxes for rental; was thereby an actual lessee of the State. At the time of the proceedings instituted by the Commission his property, in the shape of planted oysters upon the grounds held by the Commission to be public bottoms within the Baylor survey, were of the value of more than $8,000.

By the action of the Commission, it has been determined that the stakes designating the grounds of appellant shall be at once removed and that his planted oysters shall be thrown open to the public, and that he, the owner, shall not be permitted to take possession of or to remove the same,—thus confiscating, without any legal proceedings, the property of appellant.

It is contended by appellees that appellant appeared before the Commission. "It is not enough that the

[1] "§ 15. *Resurveys of Planting Ground.*—When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals, which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from said ground . . ."

owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice and give them the right to a hearing, and an opportunity to be heard. . . . The constitutional validity is to be tested, not by what was done under writ, but by what may by its authority be done." *Stuart* v. *Palmer*, 74 N. Y. 183; Taylor, Due Process, § 133; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424; *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127.

Mr. Robert W. Shultice, with whom *Mr. J. D. Hank* was on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellant sought a temporary injunction restraining the Virginia Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment. He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that the proposed action would deprive him of property without due process of law contrary to the Fourteenth Amendment.

A majority of the three judges composing the court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights of property appellant claimed in respect of the specified lands, or the oysters thereon, were necessarily based upon the statute itself and that he could not both assail it and rely upon it in the same proceeding. *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, 117. And further that the evidence showed conclusively that the threatened

action would not deprive him of any property which he could rightfully claim. It accordingly refused to grant a temporary injunction but did not dismiss complainant's bill. We find no reason to interfere with this decree and it is affirmed.

Affirmed.

MR. JUSTICE CLARKE concurs in the result.